United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN DELLACAVA, et al.

Defendant-Appellant.

On Appeal from Judgment of Conviction of the
United States District Court for the
Southern District of New York

BRIEF FOR APPELLANT DELLACAVA

LAWRENCE STERN
Attorney for Appellant Dellacava
343 West 29th Street
New York, N.Y. 10001
(212) 947-0537

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

ARGUMENT (cont'd.) Page

TABLE OF AUTHORITIES

Cases: (Cont'd.) Page

Cases: (Cont'd.) Page

Cases: (Cont'd.) Page

Cases: (Cont'd.) Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

-against-

Docket No. 74-1037

STEPHEN DELLACAVA, et al.

Defendant-Appellant.

----------x

ISSUES PRESENTED

1. Whether since no warrant was obtained for the vacuum search of a gym bag seized from appellant's automobile and since no warrant had been obtained for the search and seizure of the bag and other evidence from the trunk of the car five days before the vacuum search, the evidence thus obtained must be suppressed.

2. Whether since appellant's conversations were seized for 30 days pursuant to an order authorizing seizure of the named party's conversations only, no amendment having been obtained to include appellant, and since the original order was based on misrepresented averments, the conversations monitored without regard to minimization or notice requirements, and other evidence thereby obtained, must be suppressed.

3. Whether appellant was a person aggreived by the unlawful search and seizure of the suitcase in Toledo, and that search, conducted without a warrant or probable cause, contravened the Fourth Amendment.

4. Whether the court's refusal to consider appellant's pre-trial motion to suppress money allegedly seized from his automobile on February 3, 1972 and the consequent admission of testimony at trial about that money, deprived appellant of his right against unreasonable search and seizure.

5. Whether the court's failure to give limitng instructions throughout the trial upon receipt of evidence of hearsay conversations and acts in furtherance of separate conspiracies, and the court's general and contradictory final charge on this subject, and the Government's prejudicial evidence of uncharged crime and separate conspiracies, deprived appellant of a fair trial.

6. Whether appellant was deprived of a fair trial by the Government examination

of witnesses which elicited irrelevant and highly prejudicial testimony about non-probative and previously excluded matter and by the use of evidence of minute dust tracings consumed in Government analysis.

7. Pursuant to Federal Rules of Appellate Procedure (28(i), appellant DellaCava respectfully incorporates by reference any arguments raised by co-appellants insofar as they are applicable to him.

STATEMENT PURSUANT TO RULE 28 (a)(3)

A. Preliminary Statement

This is an appeal from a judgment of conviction rendered against appellant in the United States District Court for the Southern District of New York (Frankel, J.) on January 3, 1974, convicting appellant of conspiracy to transfer narcotics not in pursuance of a written order form and to distribute and possess with intent to distribute narcotic drugs (26 U.S.C. 4709(a), 7237(b); 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A)), and of two substantive order form violations and two substantive possession - distribution violations, and sentencing him to a total maximum sentence of 15 years covering all counts.

B. Statement of Facts

In an indictment filed in April, 1973, appellant was charged with conspiracy and substantive violations of the narcotics laws. The indictment charged a conspiracy between July 1, 1969 and the date of indictment, and substantive violations in August, 1970, on or about November 6, 1970, and in October, 1971. The indictment charged various indicted and unindicted co-conspirators, and appellant was ultimately tried together with five others named as defendants on the indictment, John Capra, Leoluca Guarino, Robert Jermain, George Harris and Alan Morris.

The Suppression Motions and Hearings

The Warrantless Search of Appellant's Automobile, April, 1973

On September 18, 1973, testimony was heard on appellant's motion to

suppress evidence (heroin tracings, money, gym bag, and plastic bag heat sealer) seized from his automobile after his arrest on April 13-14, 1973.

David Samuel, a Drug Enforcement Administration agent, testified that on the night of April 13, 1973, he was given an arrest warrant for appellant Dellacava. The warrant was based on the indictment in this case and was to be executed as soon as possible. The agent and his Group Supervisor, having learned that appellant was being surveilled at the Batchelor's III Restaurant, proceeded there and met New York City detective George Eaton. Twelve other agents were on hand in the vicinity of the Restaurant to watch for appellant. (H. 141-142, 168*).

After midnight in the area around the Restaurant, there was little automobile or pedestrian traffic; it was generally quiet on the street. Appellant's car was parked three blocks from the Restaurant. He exited the Restaurant and began walking towards the car. Twice he stopped at phone booths on the way. No one accompanied him, and there were no pedestrians near him. The police were watching him continuously. Agent Samuel could have arrested appellant at any point along the way to the car, but he decided not to do so for fear of alerting anyone to the fact of appellant's arrest. (H. 174, 180).

Appellant got into his car, and two police cars followed him to 86th and Lexington Avenue, a busy intersection even at 2:05 A.M., where the

---

* "H" numerical references are to the minutes of the hearings of September 17 - 26, and October 2, 1973.

policemen and agents decided to stop and arrest him, causing crowds to gather and traffic to be blocked. This necessitated that appellant and his automobile be taken to the New York Youth Club garage under the street in the vicinity of the 79th Street Boat Basin. There, in the presence of the other three law enforcement officers, Agent Samuel advised appellant of the charges and the rights, but the agent cannot recall if he showed appellant the arrest warrant. (H. 143-144, 148).

Appellant was handcuffed there under the street, and the officers proceeded to search the car, including the area under the hood. (H. 203). "At that time, we intended to seize the car - excuse me, impound the car for safekeeping. We couldn't leave it on the street. We searched it for valuables." (H. 144). They did not have a search warrant, nor had they attempted to get one. (H. 213). At that time, Agent Samuel knew only that this particular automobile, registered to appellant, had been used for appellant's transportation, although he was professionally curious about what was in it. (H. 175-176, 179). His official report characterized the search as incident to arrest (H. 209), and he testified that such searches were routine procedure to inventory the property against complaints of police pilferage. (H. 145). After the search, the car was left in the boat basin; all four officers left with appellant. As far as the agent knew, the car was later transported to a United States Goverment garage where it was kept for about two weeks before it was

turned over to appellant's family. (H. 198, 213).

About 1/2 hour after the arrest, during the search at the boat basin, one of the other officers found in the trunk a brown gym bag containing $13,999 in cash; Agent Samuel discovered near it a Sears and Roebuck, "Meals in a Minute", plastic bag heat sealing machine. The key to the trunk had been taken along with the ignition key, when the latter was pulled from the ignition. (H. 199-200).

The gym bag was submitted to the laboratory for testing and came back with traces of heroin. (H. 145-146).

The Court ruled that since the issue had not been specifically raised in appellant's motion papers, the failure to take appellant directly before a magistrate for arraignment would not be considered by the Court. This ruling came, notwithstanding testimony from Agent Samuel, that the arrest warrant directed him to bring appellant to the magistrate forthwith, that appellant was not arraigned until the following Monday, and that Agent Samuel made no return on the warrant. (H. 198-220).

George Eaton, the New York City detective who figured prominently in this case throughout, was called by the defense. Detective Eaton's first encounter with appellant Dellacava's name, in relation to the investigation in this case, was in December, 1971, in connection with wiretapping (See infra). (H. 234-236).

Eaton corroborated Agent Samuel's testimony that their purpose was

to arrest appellant away from the Batchelor's III area, so as to avoid alerting other subjects of their investigation to the arrest. (H. 257). The key to the trunk of the car was seized directly from appellant. (H. 267).

On the question of the police authority to search the vehicle, the following testimony and colloquy occurred:

> Eaton: I believe it is police department and federal procedure, when you search a vehicle you have to inventory any valuables inside the car. (H. 268).
>
> Q.: So all you are telling us now is that it is your belief that under city procedures this would have been all right to make an inventory search; is that right?
>
> A.: It would have been required.
>
> Q.: But you can;t tell us where you got that authority from?
>
> Objection from the prosecutor.
>
> Court: I wish you would go on to something else... I don't want to hear anymore about New York City law. (H. 269-270).

In an opinion dated October 16, 1973 (see appellant's appendix), the Court upheld the search of the vehicle and denied the motion for the suppression of the evidence, including the heroin tracings found therein. The Court held in sum:

> The precautions attending Dellacava's arrest were reasonable and sensible, not pretextual ... (slip opinion at p. 3).
>
> One officer's report described the search as 'incident' to the arrest, but this is not much argued now. The main theory of justification now is that it was an 'inventory search', ... but this justification has little or no support in the record. (id at p. 4).

> Although at the pre-trial hearing, the officers tended to downplay their knowledge of Dellacava's alleged involvement in narcotics activities as well as their interest in his vehicle ... the officers had reason to believe that the defendant's vehicle was subject to seizure under 49 U.S.C. Section 782 (pp. 7-8).
>
> The question is a close one, but the search should, on balance, be held lawful (pp. 8-9).

The Warrantless Search and Seizure of Appellant's Conversations

On September 23 and 24, 1973, Detective Eaton testified to circumstances surrounding the issuance of the two wiretap orders which the Government asserts provided authority for Eaton's monitoring and recording of appellant's conversations at Diane's Bar between December 9, 1971 and February 3, 1972.

On November 8, 1971, Eaton gave Assistant District Attorney Cliff Fishman in New York County information relevant to securing a wiretap of conversations of Joseph DellaValle over his home phone and the phone at Diane's Bar. Affidavits containing Eaton's information were submitted to Judge Birns, and the first tap order on those phones for conversations "of Joseph DellaValle with co-conspirators" was issued December 8, 1971. (H. 904-906). Most of the information submitted came from Eaton's confidential informant and a Detective McGrory. (H. 981). (The Court directed the United States Attorney to find this informant, and tell the defense where he could be found; the Government was apparently unable to do that. (H. 974)). The bases for Detective Eaton's assertion that he could recognize the telephone voice of Joseph DellaValle in December, 1971 were two 60 second telephone booth phone calls made by the informant while the detective put his ear to the receiver, on October 29, 1971, and November 2, 1971. The phone booth door was not closed,

and traffic sounds intruded on Eaton's ability to distinguish the voice. Both times the informant identified the voice on the other end as DellaValle, but the second time, Eaton himself could only say the voice "seemed" like the same one he'd heard on the first call. (H. 920-921, 976, 979, 980). Prior to applying for the tap, Eaton told ADA Fishman that he (Eaton) would have trouble distinguishing DellaValle's voice and that the contents of the conversations wouldn't help very much. Neither Eaton nor Fishman explained the voice identification problem in their affidavit in application for the tap. (H. 991, 1099).

Prior to the installation of the tap, Fishman did tell Eaton to monitor only conversations of DellaValle and to be especially careful on the public phone in the bar, which phone would be used by many uninvolved people. Fishman told Eaton to turn off the machines if a conversation did not include DellaValle or if a conversation was privileged. The machines were not to be operated automatically; Fishman was to be kept posted, and if conversations about other crimes were overheard, Fishman was to be notified and he would take whatever action was necessary. (H. 907-910).

Pursuant to the December 8 order, Eaton began monitoring on December 9. He had many problems: there were short conversations that made no sense; he had to wait for the right parties to come to the phone; many of the voices sounded the same, and the various nicknames made it even more difficult to identify the speakers (the Detective never used the police alias file to clarify for himself who was who. (H. 1118-1119)). (H. 918-919). During the first week, no speakers over the bar phone were definitely identified by Eaton or the other monitoring

officers, as DellaValle, but the conversations were monitored anyway. (H. 1002). It was not until December 19, according to Eaton's hearing testimony on direct examination, that he realized that the voice they had been monitoring for the previous 10 days, identified as "Steve" or "Beansie", a voice they thought was probably that of DellaValle, was not that of DellaValle. (H. 921-923). The officers were aware they might have been listening to the wrong man from the start, but they continued to monitor "Steve" or "Beansie" as if he were DellaValle. As Eaton put it:

> He seemed to be in this bar a lot, this male, either unnamed or Beans or Steve. And there was a tendency on our part to believe that it was DellaValle. (H. 1003).
>
> I explained what my problem is with Joseph DellaValle's voice. I assumed all along I was listening to the wrong guy...(H. 1157).

Eaton further testified that as early as December 12, he had "had doubts" that "Steve" or "Beansie" was DellaValle. By December 11 or 12, he learned that DellaValle's nickname was "Blackie". (H. 992, 999-1000). Also, on the 12th, there was a conversation logged as "Beansie's wife looking for Beansie", and the Detective had no information that DellaValle was married. (H. 1002). Also on the 12th, a conversation was heard in which Steve told Jean he was tending bar, and the Detective knew that DellaValle didn't tend bar. (H. 1119).

Indeed, there was substantial evidence presented by Eaton's own testimonial admissions, that months before the DellaValle order, Eaton knew that Beansie was Stephen Dellacava.

Q.: It is your best opinion from Defendant's Exhibit N that was shown that you were working with on June 11, 1971, you knew Beansy was Stephen Dellacava?

A.: Yes. (H. 1208).

In the Spring and Summer of 1971, Eaton was a chief investigator, and "had the order for the wiretaps" of one Nicholas Cuccinello. (H. 1139). During those taps, he participated in the monitoring of over 3000 calls and it was his habit to go over the tapes and logs of the recorded conversations. (H. 959-960, 1210). He heard a voice during those taps identified then, well before December, 1971, as Beansie, (H. 1143), and eventually, upon replaying the Cuccinello tapes, he realized that there was a connection between people overheard then and on these taps, (H.959-960), and that the Beans he heard talking to Michael Santangelo on the Cuccinello taps was "the same guy as at the social club". (H. 1102-1103). Throughout the logs of the Cuccinello taps, "Beansie" conversations are noted; Beansie's address is noted as 2034 Second Avenue, the address of Diane's Bar and Beansie is specifically identified as Steven Dellacava. (H. 1102-1103, 1105-1106, 1107-1108). A lengthy conversation of Beansie's of July 16, 1961, which the Detective admitted monitoring and transcribing, was noted and identified in his logs. (H. 1105-1106). A notation appears on a Cuccinello transcription, "Beansy, 2034 Second Avenue, Steven DellaCava". (H. 1107). On July 8, 1971, the notation, "plant closed and to vicinity of 2034 Second Avenue, Beansy's appears. (H. 1108). On July 8, 1971, this notation: "Danny, Beansy looking for Big Paddy. Not there, Nicky Red, Steven Dellacava". (H. 1109). Detective Eaton testified that on July 10,

1971, he personally conducted a surveillance of Beansy's place, Diane's Bar. (H. 1206).

The logs and transcriptions of the Cuccinello taps, identified by Eaton and containing the above references, were received in evidence. (H. 1199-1209). (Def. Ex. J, K, L, E, M, N, O).

The particular spelling "S-T-E-V-E-N" which was used by Detective Eaton in his application for the January 6, 1972 order for appellant Dellacava's conversations, is the same spelling of that name that was used in the Cuccinello log notations in June and July, 1971. (H. 1102-1109).

Despite the above admissions that he knew Beansy was Steven Dellacava in June and July, 1971, Detective Eaton testified that a clear separation between Dellacava and DellaValle did not occur until December 19, 1971, while monitoring a supposed conversation of DellaValle on the December 8 order. On that day, Eaton heard someone he thought was DellaValle turn away from the bar phone and ask someone in the bar named "Beans" how long he would be in the bar. (The Spanish person on the other end of the phone conversation was coming to the bar to get something). (H. 922-923). Detective Eaton further testified that he continued to monitor Beansy's conversations after December 19, even though he definitely knew then that Beansy was not DellaValle and even though he was authorized by the December 8 order to overhear only DellaValle conversations. (H. 1084, 1089). ADA Fishman, whom Eaton notified on December 20, that he man they were monitoring was not DellaValle, told Eaton to continue to "intercept the conversations of this guy with the thought

that we are going to amend the order". (H. 924-925). No amendment was sought until January 6, 1972, when a renewal of the December 8 order became necessary. On December 21, Eaton had picked up a conversation between Beans and a male negro later identified as Jack Brown. Beans said he'd see Brown two days later. On December 23, Beans called Capra who told Beans to come up and get the "present", (a word used in at least one other conversation). Eaton watched the bar. DellaValle pulled up in a car and waved; Dellacava came out and got into his car, and drove to the social club. Dellacava went into the club, came out, opened the trunk of a Lincoln Continental, took out a package and put it in his car, drove to Pelham Chateau and came out with a manila envelope. In the Detective's opinion, the package was the same size as 1/2 kilo of heroin. Based on these conversations and comings and goings and other "interpreted" conversations seized while monitoring under the DellaValle order, the Detective made an application on January 6, 1972, for a renewal of the DellaValle order and an amendment to include appellant. (H. 925-934).

Pursuant to the January 6 order, two conversations were overheard on February 3, 1972, between appellant and Leo Guarino. One was about seeing the other guy, and the second set up a meeting on Fifth Avenue after the other guy was seen. After these conversations, appellant was followed by another detective to Jack Brown's apartment building and was seen to come out of Jack Brown's apartment a few minutes later, carrying a black toiletry case. Eaton went directly to Fifth Avenue and when he arrived there, appellant and Guarino had already been arrested. Sergeant MacDonald was holding a black toiletry

case containing $11,500. There had been prior conversations between appellant and Jack Brown about appellant's coming over to play chess and about bringing "a little friend". Since appellant was not seen in the company of anyone else entering Jack Brown's apartment, Detective Eaton believed "little friend" meant 1/2 kilo of heroin. (H. 935-941).

Short conversations during the early part of the first wiretap order didn't make sense to Detective Eaton, so these conversations about being sick and getting better by Monday meant to him that Vino Green wanted narcotics and appellant couldn't deliver. Other conversations suspect to Detective Eaton were (1) a conversation on December 11 wherein appellant tells Green he can't help him, (2) a conversation on December 27 wherein appellant was heard to say, "The moving van people don't have no point in time," which meant to Eaton, only possibly, that appellant, who had not been observed in the moving van business, would have to arrange or rearrange a delivery of narcotics, (3) a January 7 conversation wherein Vino Green said, "it growed" which Eaton thought might mean that Green got a package and was making money on it, (4) a January 14 conversation in which Capra asks appellant if he has an appointment with the right guy, (5) a January 18 conversation in which Capra tells appellant to bring the money and they'll split it, (6) a January 22 conversation in which Capra says he wants to go and see somebody with appellant, (7) a January 21 conversation in which appellant says he's got it, and (8) a January 27 conversation in which appellant says some people are on his back and it isn't a dime, and a car costs a lot of money, the latter

phrase meaning, to Eaton, a kilo of narcotics (SIC). (H. 943-952).

In an opinion dated December 4, 1973, the Court denied appellant's motion to suppress his conversations monitored pursuant to the December 8 and January 6 orders. The Court excused the monitoring officers for their failure to avoid appellant's conversations during the period between December 9 and 19, even though appellant was not named in the order, citing all the attendant difficulties of voice identification and disregarding Detective Eaton's admissions that he knew in July, 1971, that Steven or Beansy Dellacava was not DellaValle.

> The delay in reaching this point in light of all the circumstances, is both understandable and excusable. There never was, nor do defendants suggest, any reason whatever for the monitoring officers to pretend that Dellacava had not been distinguished as a separate voice when he actually had been.
> (slip opinion at p. 10)

As to all the indications, during the initial 10 day period of the tap, that the two men were separate entities: "to be sure, better detective work would presumably have forestalled points pressed by defendants. But this is not because any of the omissions pinpointed now was generated by any disposition to ignore or violate the rights of privacy with which both the statutes and the Fourth Amendment are concerned". (Id at 13).

The Court did recognize that the failure to obtain an amended order before continuing to monitor appellant's conversations after December 19 was error. "It would have been possible promptly upon ascertaining the separate identity of "Beansie" ... to have gotten an amended order covering him even

though his correct name was not yet known". (Id at 14). But,

> the delay of some 17 days, when that delay embraced Christmas and New Year holidays among other obstacles to speedy action, does not serve to make lawless and unavailable the evidence of wrongdoing which was being sought with generally commendable attention to the constitutional and statutory proprieties. (ID at 17-18).

The Search of Appellant's Automobile and the Seizure of Money therein on February 3, 1972

In the course of pre-trial hearings on September 20 and 21, the Government revealed for the first time its intention to use evidence from a search and seizure of appellant's automobile on February 3, 1972, "a direct product" of the Diane's Bar wiretaps, even though only money was recovered and the case was dismissed in the State court. Defense counsel moved for a suppression hearing on the absence of warrant and probable cause aspects of that seizure, and referred the Court to motion papers previously filed wherein the issue was raised. (H. 695-740).

A motion on behalf of appellant, Guarino, had been submitted and the accompanying memorandum of law stated, at pp. 2-3, "The arrest of the defendant, Guarino, on February 3, 1972, was illegal and the evidence gained therefrom should be suppressed ...

> According to the affidavits of Detective Eaton concerning Guarino's arrest, probable cause to arrest Guarino rested upon the interception of a conversation between Guarino and Dellacava and the observation of Detective Eaton of Guarino speaking to Dellacava through a car window on a public street...the conversation alleged by Detective Eaton to form a further basis for probable cause apart from being innocent and innocuous, was illegally intercepted ... and, accordingly, cannot form a basis for probable cause.

In a motion and memorandum submitted by appellant's newly retained trial counsel on June 18, 1973, counsel stated at p. 2

> Defendant, Dellacava, also joins in all other motions heretofore made by all co-defendants, in order to achieve record standing on those issues and in order to avoid further delays.

In motions submitted thereafter in August and on September 5, 1973, appellant moved

> upon the indictment herein, and upon all the proceedings previously had herein ... for an order pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure suppressing certain evidence wrongfully seized in the instant case and all other evidence derived directly or indirectly from such seizure ... (August motion)

> for an Order pursuant to Rule 41(E) of the Federal Rules of Criminal Procedure suppressing evidence in the possession of the Government and all other evidence gained as a result thereof, and for a hearing in respect thereto ... (September 5, 1973)

The Court below found that these prior written motions had not sufficiently raised the issue for appellant and that co-appellant Guarino had no standing to raise it, and that, even though the trial was not to begin for a month,

> I have concluded that I will not allow us, in the course of conversation and cross-examination and just kind of casual chit chat to increase the bulk of the pile of motions that I have already undertaken to hear before we can begin to try this case. I just have to cut it off somewhere. If necessary, if anybody is convicted I'll have another look post-trial, but I'm just not going to spend the whole autumn adding onto the pre-trial motions that require evidentiary hearings based on the obviously fertile and energetic machination of counsel in this case. (738-739).

THE TRIAL

Immediately after the Government's opening statement, counsel objected that the evidence as described by the prosecutor, would show a prejudicial multiplicity of conspiracies. The Court ordered the trial to proceed; no instructions were given to the jury. (25-27*). **

Robert E. Johnson, a Special Agent for the Drug Enforcement Administration, was the first Government witness. He testified that on November 5, 1970 at the Detroit Airport, he saw Simms and Harris get on a flight to New York. On December 8, 1970, at the Detroit Airport, he saw Simms and Eugene Brown arrested while putting a black box in the trunk of a car. The heroin found in that box was introduced into evidence (69-76).

---

* Numbered references are to pages in the minutes of tri al.

** The Court ruled that each defendant should have the benefit of every objection that fairly applies to him, regardless of which counsel makes it. (3361).

Joaquin Ramos was 42 years old at the time of the trial; 20 of those years he had spent in prison (775). He was first sent to prison in 1952 for possession of heroin, did two years on that conviction and another two years on a Federal detainer, for heroin. Out on the street in 1954, he began selling heroin again, and parole violated in 1956, he was in again. In 1957, after a short interim on the street, he was arrested and convicted of violation of State and Federal narcotics laws and received a total sentence of seventeen years. In 1969, he was released on parole (140-141, 497-510), and once again he was arrested in Cleveland in May, 1970, at which time he lied to the police to get out of jail; he was released five days later and, according to his testimony, he had no idea why he was not parole violated on this arrest (343-347, 522-525, 777). He had been reporting to his parole officer regularly since his 1969 release, and he regularly lied to the parole officer about his activities (789). On November 10, 1971, he was arrested and after eleven months awaiting trial in Toledo, Ohio, during which time he was taking thorazine and cough medicine and maybe hearing voices, he was convicted for selling heroin and cocaine and sentenced to 10 - 20 years in prison. Three eyewitnesses had identified him as the man who had checked a suitcase containing contraband at the Toledo Railroad Station. (458-462, 929-930).

After the conviction, he was brought to New York in "shock" over the 10 - 20 year sentence (598), and he agreed to cooperate with the Government after they promised him time served on the Toledo conviction, non-prosecution on the indictment in this case, and intervention with the Parole Board on any violations (467-468). The Government was paying his wife $600.00 per month, and he was getting $8.00 per day for food. During this trial, he was taking tranquilizers, given him by a doctor he would not name (143, 600). Prior to his testimony on the witness stand, Federal agents had interviewed him extensively and repeatedly and had supplied him with the dates of specific events derived from their surveillances of him (646, 1094, 1115).

Ramos testified that in 1969, after his release from prison, he met Mario Delgado who came to see him and had conversations with him about engaging in the narcotics business. Delgado was not named as a co-conspirator in the indictment (197-198), but objections to these conversations were overruled, and request for the co-conspirator hearsay instruction was denied by the Court. "No. I will give an instruction if and when it is necessary." (143, 142-143).

Delgado took Ramos to the Havermayer Social Club where Ramos saw Guarino, who introduced him to Capra and DellaCava. There was a conversation in the Club about Ramos' going into the business again using

Jack Brown. During the fall of 1969, Ramos was at the Club and saw DellaCava bring in money which Capra and Guarino would split and DellaCava would get a portion of it. At the Club, Ramos received approval for the membership of Alex Metro, and Metro was given a key to the Club. During the period of his partnership with Metro, according to Ramos, the method of their operation was as follows: a customer would give Ramos the keys to the customer's car, and Ramos would give the keys to DellaCava who drove the car around and parked it; Alex Metro would then pick up the car and deliver it to the customer, the narcotics having been placed in it. The money from the customer would go to Capra. Ramos testified about hidden traps at the Social Club, and about conversations with Capra at the Club about testing narcotics at the Club, cooking in mineral oil with a thermometer, a test which two chemists later testified was not valid to identify the goods (144-161, 234, 243, 2049). When one of the chemists was asked about the validity of the melting point test, he volunteered that it was the same test used in the film, "The French Connection". Motions for mistrial were denied and the Court instructed the jury to disregard the remark. (243).

Ramos further testified that in the early part of 1970, he broke with Alex Metro and was introduced to Robert Jermain by Capra and Guarino. Jermain said he had customers in Detroit. For five or six months,

the method of operation, according to Ramos, was that Jermain would order from Capra and Guarino and arrange with DellaCava for the receipt of the goods which Jermain would then deliver to Jimmy Rosa. Ramos testified to a conversation with Capra and Guarino in April, 1970, about the people in Detroit. During a March, 1970 meeting among Ramos and Jermain and Harris and Marabel from Detroit, Jermain told Harris, the money would have to be "up front". Jermain dealt with Harris through the phones at the Allerton Fish Market in which Jermain apparently had a business interest (181-189).

At Jermain's behest, Ramos met with Marabel and Simms in New York in the Spring of 1970. Marabel gave Jermain and Ramos money which they took to the Club. Capra, Guarino and DellaCava were there. A few days later, Jermain gave Ramos a share of the money and said he had taken care of the Detroit people (255-258).

In November, 1970, again at Jermain's request, Ramos met Harris and Simms at Tom's Villabianca Restaurant, where the latter two said they wanted narcotics. Ramos went to the Club and told DellaCava that the people were at Tom's and that he would return to the Club. The next day, Jermain gave Ramos some money and said he'd taken care of Harris and Simms. Ramos testified he paid $24,000 to Capra and Guarino and never saw an order form (259-264).

Over jection that these conversations were not in furtherance of any conspiracy or any conspiracy of which appellant was a member, Ramos was permitted to testify to conversations about the gift of cars from Harris to Jermain and Ramos and about debts owing to Jermain from Harris prior to Ramos' association with them. No limiting instruction was given (266, 268).

In early summer of 1970, Ramos says, he had a conversation at the Club in the presence of Capra, Guarino and DellaCava, describing a meeting with Harris' big Detroit customer, Alan Morris. Ramos testified that Guarino told him to check out Morris; he and Jermain went to Detroit to Morris' house. They told Morris they must have the money "up front" and an airport exchange was arranged and carried out for two kilos and $48,000, $40,000 of which, according to Ramos, went to Capra and Guarino. In August, 1970, a similar transaction was completed. Ramos did not see any order forms (275-291).

At the beginning of December, 1970, Ramos saw Jermain, Capra, Guarino, Simms, Eugene Brown, Harold McSpadden, Alan Morris and DellaCava at the Ali-Bonavena boxing match at Madison Square Garden. After the fight, Ramos went to Diane's Bar and told Capra and Guarino that Simms wanted a half kilo. Jermain made arrangements with DellaCava

to pick it up and said he took care of Simms. A few days later, Jermain told Ramos that Simms had gotten arrested in Detroit with the half kilo, and the two went to the Club and told Capra and Guarino, and nobody knew what had happened. DellaCava, according to Ramos, said "everything went off fine." (298-304).

In February, 1971, Morris wrote that he wanted to see Jermain and Ramos in Miami, and they went. When objection was taken to this evidence as separate conspiracy material, the Court said he'd see how it all looked at the end of the case; no limiting instruction was given (304, 313-316). In Miami, Morris wanted some narcotics on consignment, but back at the Social Club, Capra told Ramos that Morris could have only the six kilos he was willing to pay for "up front". In March, 1970 (SIC) (322), Jermain and Ramos collected 125 or 150 thousand dollars from Morris in Cleveland, and they later told this to Capra and Guarino, who told Ramos that the narcotics were to be taken to Detroit by plane and the baggage check mailed to Morris. "Nickie the Red" was rejected as a carrier because he was working at the time with Sperling. Several days later at Diane's Bar, Nickie the Red himself refused the carrier job, because he was working with Sperling*. There was an alternative

* Over objection the Government was permitted to elicit from Ramos that he and Capra had visited Sperling who said he knew of a "load". The Court reserved decision on whether this was within the ambit of the conspiracy as charged, and there was no limiting instruction (335, 336, 345). The same objection was made to a conversation in 1969 between Capra and Guarino wherein Guarino supposedly said he had started Sperling in the business with goods on consignment. There were no limiting instructions (470-471).

agreement on Pat Vecchio for the carrier job and Capra and Guarino told DellaCava to arrange it with Pat and to buy a good new suitcase for the job. In April at Diane's in the presence of Capra, Guarino, DellaCava, Jermain and Ramos, it was said that everything had gone smoothly (322-334).

In May, 1971, when Jermain and Ramos went out to Cleveland to collect the balance owed from Morris, they were arrested there in a hotel room with Morris and a suitcase with $50,000. Five days later, Ramos was mysteriously released. In June, Jermain and Ramos went back to Cleveland with Rocky Sassone, whom Ramos had hired, to collect the balance from Morris, and at that time, Morris introduced Willie Middlebrook to Ramos (335-356).

Ramos testified that he had been trying to get Capra to let Morris have goods on consignment and that Capra agreed to a deposit of $145,000 on a 6 kilo transaction. Ramos wrote to Morris. In September, Morris called and arranged a meeting with Ramos at which the baggage check method of delivery in Detroit was agreed to. Morris gave Middlebrook's address and a suitcase containing $145,000-$150,000 to Ramos, and Ramos took the suitcase to his home in Monroe, New York and then to the trunk of Capra's car. In October, 1971, at Diane's Bar, there was a discussion in the presence of Capra, Guarino, DellaCava, Jermain and Ramos about who to get as the carrier for the package to Detroit.

Ramos gave the paper containing Middlebrook's address to Capra who gave it to DellaCava. A piece of paper, marked Government exhibit 21, on which, according to Ramos, Capra ahd written various amounts owed to him by Jermain and Ramos, was received in evidence. On the first Sunday in October, Ramos and DellaCava went to Penn Station and found out there were no trains to Detroit. A week later, Jermain told Ramos that the delivery went to Toledo, Ohio. On November 10, 1971, Ramos was arrested and he was eventually tried and convicted as the man who had checked a bag containing heroin and cocaine at the Toledo train station (359-380, 432-468).

Ramos knew that Diane's Bar was called Beansy's Place and that DellaCava's nickname was Beansy and that DellaCava had a bartender working for him and a cook named "Jimmy". He used to see DellaCava go to the cash register and in and out of the kitchen, and he used to hear Capra, Guarino and Jermain say "let's go over to Beansy's and eat." Ramos thought that Capra, Guarino and DellaCava owned the place and that Dellacava ran it (831-835).

Ramos testified that he never saw Capra, Guarino, DellaCava or Jermain in possession of heroin. Objection was taken to a remote conversation between Ramos and DellaCava about whether the packages contained heroin. Ramos was unable to say when or where or under what circumstances this conversation had occurred, or what was actually said (882-883, 988).

Rocco Sassone would do whatever Detective Jackson told him to do, because hw as concerned about being named as a defendant in this case (1400).

In June, 1971, Ramos, in the presence of Jermain, asked Sassone to go to Detroit to pick up some gambling money. He did this twice with Ramos and Jermain' Jermain would put the money in the suitcase in Detroit, and they would fly back to New York. There was $35,000 the first time and $20,000 the second time. In September, 1971, he rode with Ramos to the airport where they met two black men, one identified as Alan Morris. In the car, Sassone heard a conversation about

Earl Simms flew to New York from Detroit with Marabel in June, 1970. They met Jermain at Hugh Grant Circle and Marabel and Jermain exchanged packages. Back in Detroit, Simms saw Marabel open the package and mix some white powder. Two weeks later, they did it again, and both Jermain and Ramos met them in New York. Simms did not see any exchange in New York because Jermain and Ramos said they couldn't do it. Later, in Detroit, Marabel showed him powder he said he'd gotten in New York. There was a third trip five weeks later and two weeks after that one, Simms flew to New York alone with $7,500 of Eugene Brown's money. He exchanged this money with Jermain and Ramos for a small package with which he flew back to Detroit (1523-1556).

Jermain asked Simms to get money from Eugene Brown to buy jewelry from Ramsey. Simms did this, and with the jewelry and some more money from Brown, he flew to New York. There, he gave the money and jewelry to Jermain and got a package in return. Some of the drugs in the package went to Brown and some to Ramsey. Harris elicited Simms' carrier activities five weeks later and money went from

Brown to New York and a package went from Jermain to Brown in Detroit. In November, 1970, Harris gave him a briefcase of money, and in New York, two packages were transferred from Jermain to Harris and they flew back to Detroit (1557-1566).

Simms came in to New York for the Ali-Bonavena fight in December, 1970 and when he flew back to Detroit the next day, he was arrested with 1/2 kilo in a box he was carrying, but he did not know the drugs were there. There was objection to the receipt of this evidence, on the grounds of relevancy to the conspiracy as charged, and because there was no evidence of from whence it came. This objection was overruled, and no instructions were given (1568-1572).

After his arrest, Simms began to work as a Government informant. The Government had been providing him with room and board. He pleaded guilty to superceding information in this case, and at the time of trial, was still due to be sentenced by Judge Frankel. The Government would recommend probation or a maximum five year sentence. He pleaded guilty to one count in an income tax indictment, with the understanding that all counts as to his wife, who was named, and all other counts as to him, would be dropped (1575-1579, 1622).

Milton E. Julert was a baggage agent at the Toledo Railroad Station on October 20, 1971. A nervous man came in and checked a suitcase. Mr. Julert wondered whether there was a bomb in the suitcase so he shook the suitcase and heard the sound of cellophane. He told his fellow employee, Charles Sebold, where the suitcase was placed, and six days later the suitcase was still there. At Ramos' trial in Toledo in 1972, Mr. Julert identified Ramos as the nervous, tense, and loud man who had delivered the suitcase on October 20 (1726-1732).

The Government recalled Mr. Julert to the witness stand to ask him if he had recently identified John Capra, in a photograph, as the man who had delivered the suitcase. The Court precluded the Government from asking this question, but the prosecutor went ahead and asked Mr. Julert "have you had a recent experience in which you have misidentified ---". There was an immediate objection which was sustained, but a mistrial motion was denied (2947-2958).

Albert C. Blevins, Captain of Police at the Penn Central Railroad in Toledo, testified that on October 27, 1971, Charles Sebold spoke to him about a suitcase and Blevins went down to see it. Sebold couldn't open the suitcase, so Blevins called the Toledo police vice squad which handled

narcotics cases, and on October 28, they came and opened the suitcase. There were plastic bags filled with white powder inside the suitcase (1736-1740).

George J. Ryan, a Toledo Morals Squad Detective, procured a police lock expert at Blevins' request and the lock expert opened the suitcase. A field test was done on the white powder. Ramos was convicted for bringing the suitcase to Toledo (1742-1748, 1764).

Objection to the suitcase and testimony about it on grounds of relevancy to the conspiracy as charged and to the several defendants on trial was overruled; no limiting instructions were given (1748).

Mickey DeHook, a Toledo Metropolitan Drug Unit policeman, acted as an undercover baggage agent at the Railroad Station on October 31. Willie Middlebrook came in and picked up the suitcase (1794-1797).

The suitcase and the claim check were received in evidence over objection that no connection that no connection had been shown to appellant, no limiting instructions were given (1798).

Joseph Morris of the Toledo police went to the baggage room on October 28 and field tested for cocaine. He saw Alan Morris meet Middlebrook in the station on October 31 and he arrested them. He searched Morris and found $6,000 in cash and a mailing envelope and pieces of paper, marked Government exhibit 21A, 21B and 21. Objections to relevancy went unheeded, and no limiting instructions on this evidence were given (1803-1815).

Robert A. Beavers, a Toledo policeman was at the Station on October 28 and knew that 5-1/2 kilos of heroin were found in that suitcase (1902, 1907 1908).

Charles W. Sebold was a clerk at the Station on October 20, 1971. A man named Messina needed assistance in catching a plane back to New York City and Mr. Sebold helped him get a cab to the airport. Mr. Sebold later identified Ramos, in photographs and at the trial in Toledo, as the man called Messina (1916-1933). An airline ticket in the name of Messina was exhibited to the jury (1930).

George Eaton, a New York City detective, testified that between December 9, 1971 and February 3, 1972, he listened to and electronically recorded conversations over the phone at Diane's Bar, pursuant to a December 8, 1971 wiretap order. He could identify the voice of appellant DellaCava on the tapes to be played to the jury, because he had had conversations with DellaCava on February 3 and 4, 1972, and April 14, 1973 (2165-2169).

On January 10, 1972, a conversation was intercepted (taped and played to the jury over objection that what Eaton heard personally is the best evidence (2178)) in which Jack Brown asked DellaCava if he wanted to play chess and DellaCava asked if Brown wanted to bring the big fellow and Brown said he would "by a hokey sandwich" (2170-2199*). Sometime after this phone call, Eaton followed DellaCava, but lost him two blocks from the Havermayer Club. (2217-2218).

On February 2, 1972, a conversation was intercepted; Jack

* The Court precluded Detective Eaton from testifying about how he intercepted these "one shot cryptic" references which, in the Court's opinion, were not subject to any expertise about their meaning. (2185, 2191 , 2199).

Brown asked DellaCava if he wanted to play chess and DellaCava agreed and would bring his little friend and Brown said he'd have hors d'oeuvres (2218). On February 3, 1972, there was a conversation between Guarino and DellaCava, during which DellaCava asked for Jack Brown's phone number and Guarino gave him the number (2220). Druing a second call, fifteen minutes later, DellaCava and Guarino agreed to meet by the statute at Rockefeller Center (2222). Eaton went to Rockefeller Center and when he got there, he saw that Guarino and DellaCava had been arrested and that Agent MacDonald was holding a black toiletry case containing $11,500. Neither DellaCava nor Guarino was prosecuted in connection with this seizure (2224-2230). The money was apparently "handed over" to the Internal Revenue Service (2228) although the detective did not know this of his own knowledge and the Court refused to strike this testimony (2229).

Over objection that Detective Eaton had no foundation for knowing the voice of Vino Green in another series of conversations and that there was no evidence that Vino Green was a conspirator or that the conversations were in furtherance of the conspiracy, the jury heard conversations between Dellacava and a voice called Vino Green on December 11, 1971, December 25, 1971 and January 7, 1972 (2234-2247). The Court ruled that the identification of DellaCava's voice was enough for the admission of the conversations with an instruction to the jury that Vino Green's voice was

disputed, and that the Court would hear all the evidence before ruling or instructing on the Kotteakos point (2243-2245, 2239).

Five conversations between Capra and DellaCava on January 14, 1972 and January 18, 20, 21 and 27, 1972 were played to the jury. In these conversations, Capra would ask DellaCava if he had seen, met or talked to somebody and" Go up there and we'll split the money later". (2248).

On December 21, 1971, DellaCava told Brown there would be no Christmas Party but he would seem him on Thursday (December 23) and bring him a present. On the 23rd, DellaCava was heard to ask Capra if he should bring people a present and Capra said he should come up and get it. (2250-2253). On December 23, after this conversation, Eaton saw DellaCava put a brown paper bag in the trunk of an automobile outside the Social Club, drive to a catering club and put a manila envelope in the trunk of the car (2254).

On December 29, 1973, there were conversations in which Brown told DellaCava that these people liked his gifts; Capra asks DellaCava if another party has something; and DellaCava asks Brown if Brown had told him that he had a present for his people (2256).

Detective Eaton further testified that a substantial number of the calls were unrelated to his investigation including many calls between DellaCava and his girlfriend, Jean Pino (2288-2289).

When counsel for defendant Morris asked for limiting

instructions against the relevance of all of this evidence as to Morris, the Court once again repeated his intention to give only a final charge on the co-conspirator, hearsay - adoption rule (2308).

John Cortazzo, a New York City Police detective, saw DellaCava go in and out of 180 West End Avenue on February 3, 1972, a building in which Jack Brown had an apartment. DellaCava put a doctor's bag in the trunk of his car (2309-2314).

Wallace Millard, a New York City detective, saw DellaCava go into Jack Brown's apartment on February 3, 1972 (2317-2318).

Edward Holewinski, a Toledo court reporter, saw the Toledo suitcase in the Toledo safety building on April 2, 1973 and in August, 1973 New York agents came and picked it up. The Toledo suitcase and its inner bags were received in evidence over objection that the chain of custody had not been established (2339-2347).

Ruthella Radebuse, a Toledo cab driver, had identified Ramos as the man she drove to the airport from the train station on October 20, 1971 (2344-2356).

With the anticipation that the Government's next series of witnesses would give evidence about a separate Conforti - Sperling conspiracy, where there would be no evidence, or even mention of, DellaCava's participation, counsel objected to its introduction. The Court denied this motion and failed to give limiting instructions (2389-2394).

Joseph Conforti was arrested for narcotics offenses on April 14, 1973. He was named in a separate indictment with Herbert Sperling

pled guilty, testified against Sperling at a trial in June, 1973 and had not yet been sentenced. He was getting $815.00 per month from the Government and a promise that his cooperation would be made known to the sentencing judge (2399-2401).

Conforti testified that beginning in March, 1973, he began working for Herbert Sperling and John Caruso, mixing narcotics. He was present in an apartment at 54th Street and Seventh Avenue and he saw Sperling give money to Capra and Guarino. At the end of March, Sperling directed him, in the presence of Capra and Guarino, to go to Sperling's house and pick up $30,000. One three occasions in April, 1973, at the Bar Harbor Hotel on Long Island and another hotel, at either Caruso's or Sperling's direction, he would mix narcotics brought to the hotel by Caruso. He was arrested on the 14th of April, and the mixing paraphenalia was seized from the trunk of his car, it was received in evidence (2402-2471).

Objections were reiterated and overruled as to hearsay conversations between Conforti and Caruso and the others mentioned in Conforti's testimony, and as to the separate nature of the conspiracies, evidenced by the year's hiatus between the last evidence of any acts by appellant and the March, 1973 events testified to by Conforti. The Court gave no limiting instructions (2413-2419, 2651-2653).

David Samuel, a special agent for the DEA, pursuant to an arrest warrant issued on the indictment in this case, arrested DellaCava on April 14, 1973, at the corner of 86th Street and Lexington Avenue. DellaCava and the car he was driving were taken to the 79th Street Boat Basin Sanitation Garage where the agent first identified himself to Della Cava. While appellant was in handcuffs, four policemen searched the car, the glove compartment, under the seat, in back of the seat, visors, under the hood, crevices under the hood and under the mat in the trunk and elsewhere. No narcotics were found, and since it was Agent Samuel's professional goal to find narcotics, he would have felt better had he found some (2769-2771, 2782, 2833-2836). All they did find in the trunk of the car that time was a brown canvas gym bag containing $13,999 in cash, and a Sears and Roebuck meals heat sealer, which the agent knew to be sold in all department stores, and which he did not know to be operative (2771, 2861-2863). After the search, appellant was taken to 57th Street and processed (2772).

Four days later, the agent took the bag and the heat sealer to the chemist to find out if any traces of narcotics could be found therein. The only thing visible to the naked eye, in addition to the money, was plain dust or pocket dirt, which the agent never bothered to mention in his report (2837-2838, 4057).

Prior to its being taken to the chemist, the gym bag was kept in the DEA office where at least four policemen handled the bag and the

money inside for the purpose of making a count and bundling the money. There was heroin in and about the building the night of the arrest, and the powdery substances do tend to send up small clouds of dust (2865).

The automobile remained parked at the Sanitation Garage and it was returned to DellaCava's family a few days later; it had been impounded only for the night of the arrest (2870) and it was not swept or vacuumed by the police (2074). The Court would permit no questions about the exact nature of the police procedures surrounding the holding and search of the vehicle, ruling these questions irrelevant. Counsel argued that the failure of the police to invoke any forfeiture or impounding procedures was proof that the car was not used in a drug conspiracy and that the traces search, coming four or five days later, was not an inventory search (2870-2874).

The gym bag and the plastic bag heat sealer and the $13,999 were received in evidence over appellant DellaCava's continuing objection (2773-2782).

Robert A. Henderson, a DEA chemist, received the gym bag in his laboratory on May 3, 1973 and he was asked to find any traces of heroin in it. He found traces of heroin in the dust and consumed all of the dust in his analysis. Over objection that evidence of consumed traces of no measurable quantity was prejudicial and non-probative and that the chain of possession had not been established, the two pieces of filter paper and dust residue used in the analysis were received in evidence (2883-2888). No traces were found on the heat sealer (2925).

Mr. Henderson testified that after taking some preliminary cleaning precautions (2938), he cut open the gym bag with scissors used in other heroin testing operations (2903-2904). Nothing was visible in or on

the bag at this point (2908). He then vacuumed into the corners and crevices of the bag, with a vacuum devise used by other people in the laboratory (2907, 2910). Airborne particles of heroin do stick to surfaces and the hands of the scientist, and the particles can be sampled (2921-2923). He performed only a qualitative test, and except for the fact that not all the dust was heroin, he had no way of knowing what percentage of the dust was heroin (2916, 1879). He could have used only half of the dust in his experiment, but he used all of it because the amounts were so miniscule he might have come up with nothing had he tested only half of it (2912-2913).

On May 15, 1973, Mr. Henderson conducted a vacuum search of the Bar Harbor Hotel in Long Island and found traces there. There was objection to this evidence as unconnected to DellaCava but that objection was overruled (2888-2894).

With the end of Mr. Henderson's testimony, the Government rested its case (3004-3005). Defense motions to strike the money and bag held only the police at Rockefeller Center on February 3, 1972; to dismiss the case, or alternatively, to strike the prejudicial testimony about the Sperling conspiracy; to dismiss one or both of the separate heroin and cocaine counts 4 and 5, and for directed verdicts of acquittal were all denied (3007-3022).

Herbert Sperling testified for the defense. He had been partners in a pizza parlor business with Joseph Conforti, but terminated his partnership when he realized Conforti was mentally unbalanced. He never knew Caruso; he never knew DellaCava, and he never met together with Capra, Guarino and Conforti (3307-3310, 3390). He is serving a life sentence in the penitentiary but he has never been in the narcotics business, with or without Conforti. Conforti once told him in the penitentiary tha t he (Conforti) was going to make a lot of money by testifying and telling some small lies against Sperling. An Assistant United States Attorney asked Sperling to say anything about anybody to help himself and his mother, but he refused (3312-3318, 3414-3415).

Motion for mistrial was made and denied when the prosecutor asked Sperling if he had been indicted with Joseph Valachi and others in 1959. Counsel further objected that the Court's instructions to disregard the names were insufficient to cure the prejudice (3331-3335, 3364).

This ended the trial testimony. Counsel requested that the Court charge the jury, specifically excluding appellant DellaCava from the events during the period between February, 1972 and April, 1973. The Court said it would deny this request because DellaCava's arrest was some evidence of his participation in the events of that period (3492-3541). The defense rested (3613) and motions for judgment of acquittal were denied (3615).

In its final charge to the jury, the Court unproperly charged a preponderance test for determining membership in the conspiracy, and objection to this charge was overruled (3942, 3968 , See point V infra where the full charge is set out). Later, during jury deliberations, the Court charged a beyond a reasonable doubt standard, but did not correct its prior error (4081). Objection was also taken to one or nothing single conspiracy charge (3974, Point V, infra).

The jury returned a verdict of guilty on all counts for each defendant so charged. (4100).

ARGUMENT

POINT I

SINCE NO WARRANT WAS OBTAINED FOR THE VACUUM SEARCH OF A GYM BAG SEIZED FROM APPELLANT'S AUTOMOBILE AND SINCE NO WARRANT HAD BEEN OBTAINED FOR THE SEARCH AND SEIZURE OF THE BAG AND OTHER EVIDENCE FROM THE TRUNK OF THE CAR FIVE DAYS BEFORE THE VACUUM SEARCH, THE EVIDENCE THUS OBTAINED MUST BE SUPPRESSED

The delayed, warrantless vacuum search of the gym bag, conducted five days after the bag's warrantless seizure from the trunk of appellant's automobile, and the prior warrantless search of the automobile in an underground garage while appellant was handcuffed and in police custody, may not be justified under any of the recognized exceptions to the Fourth Amendment Warrant requirement. Neither search was incident to appellant's arrest; the search of the locked trunk was conducted a half-hour after appellant's arrest and it was conducted at an underground garage to which appellant and his car were taken by police from the scene of the arrest across town. Appellant, in handcuffs and in the custody of four policemen who had seized the keys, no longer had control over the car*. The vacuuming of the gym bag occurred five days later in a police laboratory while appellant was in custody elsewhere. Both searches were removed in time and place from the arrest and conducted outside the area of appellant's control. Preston v. United States, 376 U.S. 354 (1964), Dyke v. Taylor, 391 U.S. 216 (1968); Chimel v. California, 395

* Appellant preserved his motion on the further grounds of a delayed return on the warrant for the purpose of incommunicado detention and search. These grounds were properly raised at the hearing below, prior to trial, as the evidence developed, and the Court's refusal to entertain these grounds was error. United States v. Middleton, 344 F. 2d 78 (2d Cir., 1965); McNabb v. United States, 318 U.S. 332 (1943).

U.S. 752 (1969). Nor, once it was commandeered to the garage and the keys taken, was this a movable car on the highway in a situation dangerous to the preservation of whatever evidence it might contain and certainly the gym bag in police custody for five days was not in that situation. Chambers v. Maroney, 399 U.S. 42 (1970); Coolidge v. New Hampshire, 403 U.S. 443 (1971). There were no exigent circumstances offered to explain a pressing need for an immediate search of the car, and the police could afford to wait five days to vacuum the bag, during which time, both the car and appellant were in police custody. United States v. Garay, 477 F. 2d 1306 (5th Cir., 1973).

The agents attempted at first to justify their action on these "search incident" grounds, but abandoned that justification. At the hearing below, a new justification was offered to uphold the obviation of a warrant, "the inventory sarch." The Court below found as to the belated inventory theory, "this justification has little or no support in the record". (Slip op. at 4). Indeed, it could not have had, becuase, as to the gym bag, when the vacuuming was done five days after the car search, all visible valuables had been seized. The protection of appellant's property or the protection of the police from charges of theft or destruction could hardly have been the purpose behind the literal destruction of the bag in the process of the vacuuming. Cf. Cooper v. California, 386 U.S. 58 (1967).

The confusion of the agents and the police over how to legally justify what was actually a warrantless search for evidence in the car, and in the bag thereafter, extended into the testimonial slip-of-the-tongue by Agent Samuel,

"at that time we intended to seize the car - excuse me, impound the car for safekeeping." (H. 144).* Detective Eaton, who observed his superior, Sergeant Restivo, find the gym bag, testified that he thought the inventory was made during a search that was already being made for other reasons.

> A. I believe it is police department and Federal procedure, when you search a vehicle you have to inventory any valuables inside the car. (H. 268) (emphasis added)
>
> B. If the car is going to be seized it is a department regulation to safeguard any valuables in the car .... (H. 269) (emphasis added).

Thus, the impatience of the Court with the asserted inventory justification, an impatience which finally extended to cutting off further questioning on the important issue of the specific police regulation that provided authority for an inventory search. (H. 269-270).** The police must be charged with an

---

* The action of the four agents and police in leaving the car unattended in a sanitation garage after the search was completed and appellant was being taken to the precinct, does not support their concern for its safety (198).

** Actually those procedures were not followed according to the regulations which provide only for a list of the items, not their seizure. In addition, the car is to be delivered to the station house of the arrest, and after a Property Clerk's Motor Vehicle Invoice (PD 571) is prepared, the automobile is to be sent to the Property Clerk's vehicle storage facility without delay. Patrol Guide - Procedures at 11-148 - Arrests, Narcotic Drug. Untaxed Cigarettes or Gambling Records, Vehicle Seized.

understanding of the lawfulness or unlawfulness of their actions, and if they are "confused", or if the law is confused on their authority to search, then the necessity for a neutral judicial determination is clear, and that is the purpose of the warrant. United States v. Lawson, 14 Cr. L. 2227 (8th Cir., decided November 14, 1973).

Furthermore, this was a planned seizure of the automobile. The agent and the detective both testified that they planned to wait until appellant got into his car and drove away from the restaurant before they would arrest him. Twelve agents were there surveilling him and the restaurant. They knew they would arrest him in his automobile, and they had the time and the manpower to get a search warrant for the "inventory", they must have known they would make. To this extent, whatever evidence came into their plain view during the "inventory" search was not inadvertent; it was planned and a warrant should have been obtained. Coolidge v. New Hampshire, supra; United States v. Young, 14 Cr. L. 2344 (6th Cir., January 8, 1974), Harris v. United States, 390 U.S. 234 (1968), is distinguishable, notwithstanding the "inventory" grounds upon which the seizure was sustained in that case. There was, in fact, no search in Harris; the officer was rolling up the window, a measure reasonably and unequivocally protective of the car,* when he inadvertently spotted the evidence he seized. Since the car in Harris was seized as the instrumentality

---

* "While police custody may justify reasonable measures to protect the vehicle itself, (i.e., rolling up the windows and locking the doors), or property within plain view in the automobile, such reasonable protective measures do not extend to breaking into a locked trunk... It is not obvious to us, as it appears to be to some courts, why the inventory procedure offers the police any more protection against false claims than would a standard policy of locking the car and returning the keys to the owner; or of allowing the owner to make arrangements himself for the removal and storage of his vehicle." United States v. Lawson, supra at 2229.

of the crime, after it had been seen leaving the scene of a robbery, it was the target of the seizure and not just the place chosen by the police in advance to make their arrest of the suspect. When the police know they are going to impound a vehicle and they have the time prior to the search or seizure, a warrant is required. United States v. Young, supra.

Finding itself unable to accept the Government explanations of the car search and subsequent vacuuming, the Court below discovered a justification never put forth by the Government, wholly unsupported by the facts in the record, and legally insufficient: "the automobile could readily have been thought subject to forfeiture, and perhaps should have been labeled for that purpose, though it was not." (Slip op. at 4). The Court, admitting that it was going outside the record to find the facts with which to support this theory, disregarded the plain testimony of the agents. Although the forefiture statutes require probable cause to believe the vehicle seized is, or has been, used to transport narcotics, (490 U.S.C. 3782; 21 U.S.C. Section 881(b)), the agent, when pressed by counsel on this point at the hearing, denied any such knowledge.

> Q. Well, was yours a curiosity - was your curiosity about what was in his car based in any degree upon what you had learned about Mr. Dellacava?
>
> A. I wasn't that familiar wi th him so I probably would have to say no.
>
> . . .
>
> A. Well, I heard that his car had been used on prior occasions, so I was just curious to see his car.
>
> Q. Been used on prior occasions for what?
>
> A. While he was under surveillance.

Q. For what?

A. Transportation.

Q. Used for transportation of what?

A. Of Mr. Dellacava.

Q. And what else?

A. I'm not familiar with the case.

Q. You don't know what Mr. Dellacava used to transport, right?

A. I couldn't say, no.

Q. And you knew that Mr. Dellacava used his car for transportation is what you are saying, right?

A. Yes, sir.

Q. So you had curiosity about what was in it, right?

A. Yes.

Q. And that was the whole basis for your curiosity, right?

A. That's right.

(176-177)

Q. You really were curious to know if there were drugs in the car?

A. If there was anything in the car.

Q. Anything of a criminal nature, right?

A. Anything.

Q. Criminal or not criminal, right?

A. That is correct.

Q. You wanted to know what was in the car, period, criminal or not, right?

A. That is correct.

(179)

The Court recognized that this testimony was a factual admission that the arresting and searching officers had no probable cause to believe there was, or had been, contraband in the vehicle, ("the officers tended to down-play their knowledge ... as well as their interest in his vehicle..." slip op. at 7). The Court pointed to Detective Eaton's presence at the scene of the arrest and search as evidence that the arresting and searching agents had some kind of latent, but unexpressed, probable cause. The Court was further disregarding Detective Eaton's testimony that he did not participate in the search (265), and had not communicated any of his knowledge of the case to the arresting Agent Samuel.

> A. We did not, as far as I know, discuss this case, or I didn't even know he was involved in this case.
>
> Q. So you hadn't worked with him on this case before? Is that your testimony?
>
> A. As far as I know, yes.
>
> Q. And you hadn't funnelled any information to him in the prior eight months before this arrest was made, to Samuel, is that correct?
>
> A. Not so far as I can recall.
> (H. 247).

In addition, Detective Eaton admitted to no specific knowledge about the use of this particular automobile in the transportation of narcotics.

> Q. These people might clean out their cars; right? That was a problem, too; right?
>
> A. I have no idea what they do with their cars.
> (H. 278).

We submit that since the officers denied having any "facts and circumstances within their knowledge" and denied any "reasonably trustworthy information" that the car had been used as a narcotics transport, they had no probable cause for its seizure under the forfeiture statutes. Beck v. Ohio, 379 U.S. 89, 91 (1964). The Court's decision, in disregard of the officers' testimonial denials of probable cause, is against the weight of the evidence and should be reversed.

We further submit that the "realities", two factors considered by the Court to be within the latent but unexpressed, knowledge of the officers at the time of the arrest, were insufficient to supply probable cause to believe that the car in question was a narcotics transportation vehicle. Neither of the factors had anything to do with this vehicle, and they relate to past events: Detective Eaton's knowledge about prior narcotics activity of appellant, at other places, times and with other vehicles, and the narcotics indictment against appellant for past acts. These factors could not have given the police the kind of "absolute" knowledge that the car was used for contraband, necessary for a plain view seizure of the instrumentality of crime. Lockett v. United States, 390 F. 2d 168, 172 (9th Cir., 1968), cert. den. 393 U.S. 877. "Only where it is immediately apparent to the police that they have evidence before them", will such a plain view seizure be justified. Coolidge v. New Hampshire, supra, at 459.

Acceptance of these two factors as constituting probable cause for a seizure and search of appellant's vehicle, is to say that probable cause from

past events and places gives the police a continuing authority to search appellant's property at any time and place. The cases do not support this proposition. Sgro v. United States, 287 U.S. 206 (1932); Schoeneman v. United States, 317 F. 2d 173 (D.C. Cir., 1963); United States v. Bailey, 958 F. 2d 408 (9th Cir., 1972). There is, "a necessity for search reasonably referable to a contemporaneous violation of law." House v. United States, 411 F. 2d 725, 728 (D.C. Cir., 1969) cert. den. 339 U.S. 915 (1970). An arrest in an automobile on a warrant for the defendant's past narcotics violations, when no evidence exists to show that the defendant was transporting narcotics at that time in that automobile, does not support a search and seizure of the automobile. United States v. Stevenson, 409 F. 2d 354 (7th Cir., 1969) cert. den. 404 U.S. 851; Lott v. United States, 218 F. 2d 675 (5th Cir., 1955). If the evidence does not show that the automobile was actually used in an illegal transaction, it may not be seized subject to forfeiture. Platt v. United States, 163 F. 2d 165 (10th Cir., 1947).

Probable cause as to a particular vehicle or house does not give the police probable cause as to any person who happens to be in it, so probable cause as to a particular person does not give the police probable cause as to every vehicle or house in which he is found. United States v. Collins, 439 F. 2d 610 (D.C. Cir., 1971); United States v. DiRe, 159 F. 2d 818 (2d Cir., 1947); aff'd 332 U.S. 381; Spinelli v. United States, 393 U.S. 410 (1968); Howard v. United States, 423 F. 2d 1102 (9th Cir., 1970) (car not seizable subject to forfeiture, simply because defendant, who committed crime, drove to scene in it). This Court held as much in United States v. Squires, 456 F. 2d 967

(1972). There the police had a warrant for the arrest of the defendant for driving a car with a noisy muffler. The impounding of a second vehicle in which he was arrested washeld to be without probable cause.

Cady v. Dombrowski, 413 U.S. 433 (1973) and Cooper v. California, supra, upon which the Court below relies, are not in point. The holding of Cady is:

> Where, as here, the trunk of an automobile which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments. 413 U.S. at 448.

Thus, Cady is an exigent circumstances case, and, as we have argued above, no such circumstances present themselves in this case, nor was there probable cause to believe anything specific, let alone anything explosive, was to be found in the trunk.

In Cooper v. California, 386 U.S. 58 (1967), the arrest of the defendant was for a narcotics violation involving the vehicle, which was, in fact, impounded for forfeiture: "They seized it because of the crime for which they arrested petitioner." 386 U.S. at 61 (emphasis supplied). Here, appellant was arrested because an indictment had been found against him and he just happened to be in the vehicle at the time. Thus, "closely related"* as used by the Court in Cooper must be understood in light of the facts of that case. The fact that the gym bag was cut to pieces in the vacuuming process hardly bepeaks of custodial safeguard pending formal forfeiture proceedings. Also, the fact that

---

* "Their subsequent search of the car ... was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. 386 U.S. at 61.

actual forfeiture proceedings were instituted in Cooper, that the car was retained for four months for that purpose and that the police, from the moment of the seizure, understood this was the nature of their action is an important distinguishing factor. In this case, no forfeiture proceedings were ever instituted, the car was returned to appellant's family two weeks later*, the bag was destroyed, and the first time forfeiture was ever mentioned as a justification was by the Court below after a hearing on a motion to suppress, and after the agents and the Government had failed to sustain a series of other belated pretexts for this search. The pretextual nature of the entire arrest and search procedure is evident, not only from the delayed arrest until appellant reached his automobile and drove away**, but by the failure of the police to take the forfeiture action the Court said they were taking. This is not a question of various and varying theories, although this tactic in itself evidences pretext, (United States v. Mallides, 473 F. 2d 859, 861 n. 3 (9th Cir., 1973), but a question of abuse of police power; the offering of some legal justification for what is in fact an unlawful purpose. Just as the failure to charge the crime for which an arrest was allegedly made is an indicator of unlawful pretext, then the failure to institute the forfeiture

---

* A retainer of the car for longer than two weeks without institution of formal forfeiture procedures, i.e., reasonable notice, would have been a deprivation of due process of law for the purpose of those proceedings. Robinson v. Hanrahan, 93 S. Ct. 30 (1972).

** Amados-Gonzalez v. United States, 391 F. 2d 308, 314 (5th Cir., 1968); United States v. Martinez, 465 F. 2d 79, 82 (2nd Cir., 1972); McKnight v. United States, 183 F. 2d 977 (D.C. Cir., 1950).

proceedings here, evidences pretext in this case. United States v. Lefkowitz, 285 U.S. 452 (1932). Just as the fact that police have an abstract power to stop vehicles for license and registration without cause, does not end the inquiry as to the misuse of that power, an abstract forfeiture power cannot end it here. Bowling v. United States, 350 F. 2d 1002 (D.C. Cir., 1965); Amador-Gonzalez v. United States, 391 F. 2d 308 (5th Cir., 1968); United States v. Mallider, supra, Taglavore v. United States, 291 F. 2d 262 (9th Cir., 1961); United States v. Borcich, 460 F. 2d 1591 (10th Cir., 1972). See also United States v. Robinson, and Gustafson v. Florida, 14 Cr. L. 3043, et seq. (S. Ct., decided December 11, 1973) at 14 Cr. L. 3044 n. 1, 3049 n. 6, and 3058. Thus, in this case, even if the police had the power to seize the car for forfeiture purposes, the fact that they did not do so, and the fact that they took measures directly antagonistic to the purpose of the forfeiture (the preservation of property), precludes their actions from taking on the imprimator of that legality.*

Finally, even if forfeiture was a proper justification for the police action here, there is nothing in the nature of that action, which can be taken on probable cause only, which removes it from the Warrant prescriptions of the Fourth Amendment. The probable cause to believe the car contains contraband is the same Fourth Amendment probable cause, whether or not forfeiture proceedings are invoked. Since probable cause, in the absence of exigent circumstances, is not enough to justify search and seizure without a warrant, (United States v. Bradshaw, 14 Cr. L. 2336 (4th Cir., January 9, 1974), a statute, be it 49 U.S.C.

* "Congress did not intend to allow the seizure and forfeiture of personal property by the Government when activity by the same Government subsequent to the seizure made it impossible for the claimant to satisfy the burden of proof statutorily required of him". (To prove that the car did not contain contraband after Government has destroyed the contraband). United States v. One 1966 Chevrolet Sedan, 14 Cr. L. 2387, 2389 (D.C.S. Fla., January 16, 1974).

Section 781 et seq. or 21 U.S.C. Section 801 et seq., which purports to excuse the Warrant requirement is unconstitutional. The statutes themselves contain provisions coincident with the Fourth Amendment; 21 U.S.C. Section 881(b) has provision for seizure upon "process" with enumerated exceptions paralleling the exceptions to the Warrant requirement developed in the search and seizure case law, and 49 U.S.C. Section 786 states that, "the provisions of this chapter shall be construed ... not to impair in any way, existing provisions of law ... providing for the seizure ... of forfeited property." The exclusionary rules developed to preserve Fourth Amendment rights have been held to apply to forfeiture actions. (One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); United States v. One 1963 Cadillac Coupe de Ville, Two Door, 250 F. Supp. 183 (D.C. Mo., 1966)). Recently, the Sixth Circuit has reaffirmed the Warrant requirement in forfeiture.

> The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent circumstances ... when law enforcement officers have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the Fourth Amendment principle that warrantless seizures are per se unreasonable in the absence of exigent circumstances. Lewis v. Cardwell, 476 F. 2d 467 (1973).

To the extent that Cooper v. California is inconsistent with this position, it should not be controlling, since it is premised on a test of Fourth Amendment reasonableness overruled in Chimel v. California, 395 U.S. 752 (1969). Cooper relied on United States v. Rabinowitz, 339 U.S. 56 (1950), for the proposition that

the test of Fourth Amendment reasonableness was not whether the police could have gotten a warrant, but whether the search was reasonable. The Court in Chimel specifically overruled Rabinowitz on this test of Fourth Amendment reasonableness, saying "it can withstand neither historical nor rational analysis." 395 U.S. at 760.

> that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. 395 U.S. at 764-765.

The Court in Chimel rejected the Rabinowitz majority, adopted Mr. Justice Frankfurter's dissent, which rested on the crucial, historical role the Warrant has played as the bul wark of theFourth Amendment, and reinstated the necessity for a Warrant in the absence of exigent circumstances as the test of Fourth Amendment reasonableness. United States v. Rabinowitz, supra, at 69, 83 (dissenting opinion); Chimel v. California, supra, at 760-761. To the extent that Cooper relied on Rabinowitz's overruled rationale, Cooper is not controlling.

Since no warrant was obtained prior to the seizure and search of the automible in this case, and since no warrant was obtained prior to the vacuum search of the gym bag, and since there were no exigent circumstances to justify action without a warrant, the heroin tracings, money, bag and heat sealing machine should have been suppressed. Since the heroin tracings found in the bag were the only physical substance found directly in appellant's possession, its inclusion in evidence had a prejudicial and devastating effect on the jury and was not harmless error; the conviction must be reversed.

POINT II

SINCE APPELLANT'S CONVERSATIONS WERE SEIZED FOR 30 DAYS PURSUANT TO AN ORDER AUTHORIZING SEIZURE OF THE NAMED PARTY'S CONVERSATIONS ONLY, NO AMENDMENT HAVING BEEN OBTAINED TO INCLUDE APPELLANT, AND SINCE THE ORIGINAL ORDER WAS BASED ON MISREPRESENTED AVERMENTS, THE CONVERSATIONS MONITORED WITHOUT REGARD TO MINIMIZATION OR NOTICE REQUIREMENTS, AND OTHER EVIDENCE THEREBY OBTAINED, MUST BE SUPPRESSED

A. The Warrantless Taps

Appellant's conversations over the telephone at Diane's Bar were monitored and recorded for a period of 30 days without a warrant. Since there is no authority in the State or Federal statutes or the Fourth Amendment for the interception of wire communications without a prior court order, the interceptions of appellant's conversations were not made in accordance with the statutes or the Constitution, and the evidence thus obtained could not be used against him at the trial. C.P.L. Section 700.65 (3); 18 U.S.C. Section 2517 (3), Berger v. New York, 388 U.S. 41 (1967); Gelbard v. United States, 408 U.S. 41 (1972). And, since conversations intercepted during a second 30 day period were monitored pursuant to an order based on the conversations illegally monitored during the first period, those conversations likewise, could not be used as evidence against appellant (authorities cited); Wong Sun v. United States, 371 U.S. 471 (1963).

The Government sought to excuse the absence of the warrant on two grounds: (1) that during the first ten days of the first tap, the monitoring officers thought in good faith that they were monitoring the conversations of Joseph DellaValle, the only person named in an order under which they were proceeding*,

* Actually, Detective Eaton testified he had definite doubts about who he was monitoring, by the third day of the taps, December 11 or 12. By then, he learned that DellaValle's nickname was "Blackie", not "Beansy". By then, he knew he was listening to a man who had a wife and DellaValle had no wife. Also, by then, he knew he was listening to a man who tended bar, and he knew DellaValle didn't tend bar. (H. 992-1002, 1179).

and (2) that it was unduly burdensome and impractical for them to obtain an amended order during the latter seventeen days. We submit that neither of these excuses has factual or legal justific ation.

Since the officers were proceeding on a warrant for the conversations of DellaValle with others, it is no excuse that the officers did not know whom they were monitoring - yet this is the testimony given by Detective Eaton at the hearing.

> I assumed all along I was listening to the wrong guy (arh 47) ... He seemed to be in this bar a lot, this male, either unnamed or Beans or Steve. And there was a tendency on our part to believe that it was DellaValle. (H. 1003).

Detective Eaton had confessed to the District Attorney, prior to the application for the wiretap that his prior minimal 120 second acquaintance with DellaValle's telephone voice would not equip him to identify DellaValle during the tap. (H. 991, 1099). This failure of voice identification, prior to the tap, and into the first ten days of the tap; if excused for police inaction, gross incompetence, bad faith or for whatever reason, would mean that wiretapping warrants could issue even though the police are unable to "particularly describe", or identify "the persons or things to be seized." Const: Amend. IV. It would mean also that a general warrant is at police disposal, allowing them to seize all conversations, until such time as they, at their discretion, find and identify what they want. Positive and definite voice identification, garnered after repeated and extended acquaintance with the telephone voice of the person to be tapped, would seem to be a minimum prerequisite for any person seeking authority under the present, supposedly circumscribed, provisions of the law, to tap a telephone

wire for those particular conversations. Otherwise, a warrant that issued for the conversations of a particular person "with" others could not "be executed according to its terms" (C.P.L. Section 700.35 (1); 18 U.S.C. Section 2518(10)(a)(iii)), nor could a reasonable attempt at minimization be made (C.P.L. Section 700.30(7); 18 U.S.C. Section 2518 (5)); as in this case, the particularization of the warrant is rendered ineffective. Appellant's conversations are seized without prior court authorization, and the conversations seized must be suppressed. Berger v. New York, supra; United States v. George, 465 F. 2d 772 (6th Cir., 1972) (conversations suppressed where agents didn't know the voice of the person named in the order); United States v. Vega, 52 F.R.D. 503 (E.D.N.Y., 1971).

Although an abuse of the particularized Warrant requirement may not occur if the order permits the interceptions of a named party "and others as yet unknown", when the tap is conducted for only five days and a person other than the named party is intercepted (United States v. Kahn, 14 Cr. L. 3101, decided in the Supreme Court February 20, 1974), where, in this case, the order permits only conversations of the named party "with co-conspirators", and every conversation over the telephone, including those without the named party, are monitored for a 30 day period with no judicial supervision, the abuse is apparent.

The above arguments assume a valid order for the conversations of the named party. But, Detective Eaton's admission that he told the District Attorney he could not definitely identify DellaValle's voice, and his further admission that he failed to tell that to the judge when he applied for the order, renders the order void and the conversations monitored pursuant to it inadmissable. The failure to honestly apprise the judge, resulted in a material and knowing misrepresentation

in his affidavit that he could identify the voice sought to be overheard, when, in fact, he told the D.A. he couldn't; he testified at the hearing he couldn't; and for ten days he monitored the voice of another person. At the very least, he had an obligation to make the issuing judge aware ofhis difficulty in voice identification. Instead, two phone calls placed by the informant a month before the tap application were set out in the affidavit, leaving the impression that Eaton would have no problem making the voice identification. If he had admitted his difficulty, a warrant could not have issued; his misrepresentation was a material one, and the overhear of appellant's conversations was no simple mistake. United States v. Gonzalez, 2d Cir., decided December 6, 1973, Docket No. 1932 (and cases cited therein).

The good faith of Detective Eaton was questioned, not only on this point, but after extensive and intensive examination at the hearing below, Eaton revealed he knew appellant's name and identity and nickname "Beansy", if not also his voice, six months prior to the DellaValle tap and overhear of the conversations of "Beansy" picked up pursuant to it. Detective Eaton had been the chief investigator, and had applied for the tap order, in the Nicholas Cuccinello case in June and July, 1971. The logs and transcripts and testimony of Eaton about that investigation showed many conversations of "Beansy", definitely identified as "Steven" Dellacava (the spelling of which appeared in Eaton's affidavit for the January 6 tap order), and Eaton admitted to personally conducting a surveillance of Diane's Bar,known as "Beansy's", during the course of that investigation. Finally, the Detective admitted that he knew who Beansy was as of June, 1971:

Q. It is your best opinion from defendant's Exhibit N that was shown that you were working with on June 11, 1971, you knew Beansy was Stephen Dellacava?

A. Yes. (H. 1208).

The Court below seemed to disregard the fact that Detective Eaton finally admitted to knowing,from the start of the DellaValle tap, that appellant was not DellaValle,when it stated in its opinion on this subject, "There never was, nor do defendants suggest, any reason whatever for the monitoring officers to pretend that Dellacava had not been distinguished as a separate voice when he actually had been" (Slip opinion at 10). In view of the factual admissions by Eaton that he knew he was overhearing appellant's conversations on an order restricting him to DellaValle's, the absence of motive would not cure the illegal nature of the overhear. But there was motive; the absence of probable cause for an order against appellant. The Detective may have known appellant's identity, but, according to his affidavit, the only information he had concerning narcotics transactions over that phone was of DellaValle.

The unauthorized invasion of appellant's privacy was sought to be excused by the Government and the Court below because, "the monitoring officers worked in changing shifts ... some officers came to know one or another voice while others were ignorant of it." (Slip opinion at pp. 10-11). This, of course, would not excuse the misrepresented tap application and order based on it made by Detective Eaton, alone, knowing he didn't know well enough the voice of DellaValle. Also, Eaton did a substantial amount of the monitoring during the initial ten days, and he could, and should, have communicated to the other monitoring officers his own knowledge that Beansy was not DellaValle. Santobello v. United States, 404 U.S. 257 (1971);

Whitely v. Warden, 401 U.S. 560 (1971).

We have argued that a warrant was necessary in this case from the start of the tap and that no exigent circumstances were present to excuse its absence. If this argument is rejected, if the ten days of illegal monitoring be excused, Detective Eaton on the 11th day told an Assistant District Attorney that the wrong man had been tapped and the Assistant agreed to the continued tapping of appellant's conversations without an order, a clear and knowing evasion of the statutory and constitutional mandates. The tapping did continue for 17 days and no amendment of the order was sought until January 6, 1972, the date a renewal application of the DellaValle order became necessary. The Court below, citing C.P.L. Section 700.65 (4) and 18 U.S.C. Section 2517 (5), concluded that the decision to continue tapping without an amended order, "seems in retrospect to have been an error", (Slip opinion at 14), but,

> Although the amended order would and could have been obtained earlier, the delay of some 17 days, when that delay embraced Christmas and New Year holidays among other obstacles to speedy action, does not serve to make lawless and unavailable the evidence of wrongdoing which was being sought with generally commendable attention to the constitutional and statutory proprieties. (Slip op. at 17-18).

This Court has recently rejected a Government argument that 15 hours was too short a time in which to obtain a search warrant. United States v. DeBerry, decided November 7, 1973 (Docket Nos. 73-1283, 1353), slip op. at 5571 n. 3. If 15 hours is enough time for the Government to obtain a search warrant, then surely a span of 17 days, notwithstanding two holidays, with all the resources at the Government's disposal, cannot be excused as substantial compliance with the "as soon as practicable" mandate of the statutes, or the Fourth Amendment

Warrant requirement. Coolidge v. New Hampshire, supra; Berger v. New York, supra. And, it must be emphasized that no amendment was actually sought; instead the procedure utilized was to tap everybody under the old order until it expired, then to include these other people in the renewal application. If such a procedure is sanctioned, the monitoring officers will always be permitted to forego the amendment procedure during a 30 day order, and every 30 day order will become a general warrant for that period. Marron v. United States, 275 U.S. 192 (1927); Berger v. New York, supra; United States v. Dzialak, 441 F. 2d 212 (2nd Cir., 1971).

In addition, the dispensations afforded by C.P.L. Section 700.65 (4) and 18 U.S.C. Section 2517 (5) should not be available to justify the interception of appellant's conversations. These conversations were not monitored by a law enforcement officer, "while engaged in intercepting communications in the manner authorized by this article," and, as to the renewal order, which added appellant's name, there was no finding by the issuing judge, "that such contents were otherwise intercepted in accordance with the provisions of this article...". Thus, for those sections to apply, the monitoring officer had to be lawfully engaged in interception. But, as we have argued above, the first DellaValle order was void, because the accompanying affidavit misrepresented Detective Eaton's ability to recognize DellaValle's voice, and the interceptions of Beansy's conversations during the first ten days of that order were made, from the start, with knowledge of Beansy's identity, and no amendment was sought "as soon as practicable" after the District Attorney was informed. For these reasons, no finding that the monitoring officers were in an otherwise lawful position could have been made, and, in any case, since no finding at all was made by the

issuing judge, as required by the statute, the conversations could not be used as evidence at the trial.

B. Notice Disregarded

Section 700.50 (3) of the C.P.L. requires notice of the wiretap to the person named in the order, within 90 days of the termination of the tap, and Section 700.50 (4) of the C.P.L., permits postponement of the service of notice only upon order of the Court. cf. 18 U.S.C. Section 2518(8)(d). No postponement order appears on the face of either the December 8, 1971 order or the January 6, 1972 order, and the accompanying affidavits do not contain a postponement or waiver. Appellant received no notice of these taps within the statutorily designated period. Both Federal and State eavesdropping statutes are based on written and documented authorization, and there appears to be no provision for oral authorization for postponement of the notice requirement. There was, thus, a complete disregard of the requirements designed by Berger v. New York, supra, to obviate as much as possible the drastic and secret search without notice that wiretapping entails; the evidence should be suppressed. United States v. Eastman, 465 F. 2d 1057 (3rd Cir., 1972).

Although we maintain with Eastman that no actual prejudice need be shown when the notice requirement is unfulfilled, this Court has said, in a case where no claim of prejudice was made," the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the defendant." United States v. Rizzo, decided February 7, 1974 (Docket Nos. 73-2012 et al). slip op. at 1677. In this case, a claim of prejudice was made (despite the Court's opinion below, "that there has never been any remote suggestion of prejudice." (Slip op. at 18)). As stated by appellants in their

memorandum submitted to the Court below, there was substantial prejudice here; the wiretap evidence should consequently be suppressed:

> the only person who could establish the perjury of George Eaton in connection with his affidavit of December 9, 1971, is unavailable at this time although counsel have been informed that in February, March and April of 1972, Donald Bodie was working in New York City. Had notice been given to the defendants of the wiretap on Diane's Bar pursuant to C.P. L. 700.50, they could have made application to have made available to them such portions of the intercepted communications, applications and warrants as would have been in the interest of justice. To the defendants prejudice, they are unable to locate Donald Bodie at this time and are unable, therefore, to attack the unpinning and basis of the first Diane's Bar eavesdropping warrant.

C. The Failure to Minimize

The Court's list of excuses is a compendium of the problems in the mechanics of getting worthwhile evidence of criminality over a wiretap, and, as such, is used to justify the overhear of practically every one of appellant's conversations in its entirety, despite the non-pertinence of most. The result is to render the minimization requirement a nullity because the law enforcement agents can't, or won't comply with it, to sanction what the Supreme Court in Berger v. New York, 388 U.S. 41, 62-63 (1967), was trying to avoid, to "forgive the requirements of the Fourth Amendment in the name of law enforcement." The monitoring officers thus receive, in fact, the feared "roving commission to 'seize' any and all conversations," Berger, supra at 59*, because the Court is deferential to their limited knowledge, problems of voice identification, and their investigative desire to listen to anything the least bit suspicious, on the

---

* See also Senate Report 1097, 1968 U.S. Code Cong. and Adm. News, 90th Cong. 2d Sess. at p. 2162.

chance it may later turn out to be important. If the suspicions do not later materialize, after the conversations have been monitored, recorded, and listened to a few times, no matter how personal they may be, the only thing lost is the defendant's personal privacy.

In this case, the monitoring officers, at the time, logged the overwhelming majority of appellant's calls as non-pertinent, and the Court recognized that most of those remain non-pertinent, even with hindsight ("The exact number (of pertinent calls) we would give today ... would be too small to reflect fairly the efforts of the officers on the spot to 'minimize' ... (slip op. at 6)). But, the officers on the spot, recording most of the conversations as non-pertinent, were not minimizing what they thought then to be non-pertinent and what remain non-pertinent to this day. There was no reason for monitoring entire conversations or for any length of time, between appellant and his children, wife, girlfriend and on one occasion, his attorney for three minutes. There were, in these calls, definite patterns of innocent conversations which should have been recognized and immediately cut off. Thus, this case is distinguished from United States v. Manfredi, 2nd Cir., decided November 23, 1973 (Docket Nos. 72-2278-82) and United States v. Bynum, 485 F. 2nd 490 (2nd Cir., 1973), where no such pattern of regular innocent calls and callers could be isolated. Thus, Diane's Bar tap was not of the scale of the Bynum and Manfredi taps, not in scope of activity, monies involved, variety of activity nor number of callers, and the innocent patterns were present in this case. The lack of judicial administration is also an important distinguishing factor in this case, because, as we have argued above, there was a conscious evasion of required supervision when a misrepresented affidavit was submitted and when no amendment was sought.

For all of the above reasons, the conversations seized pursuant to the December 8 and January 6 orders, and any evidence derived therefrom, including the testimony about money supposedly seized from appellant's automobile on February 3, 1972, at Rockefeller Center, a seizure accomplished directly from the overhear of telephone conversations, must be suppressed.

POINT III

APPELLANT WAS A PERSON AGGREIVED BY THE UNLAWFUL SEARCH AND SEIZURE OF THE SUITCASE IN TOLEDO, AND THAT SEARCH, CONDUCTED WITHOUT A WARRANT OR PROBABLE CAUSE, CONTRAVENED THE FOURTH AMENDMENT

Pursuant to Federal Rule of Appellate Procedure 28 (i), appellant respectfully incorporates by reference the arguments raised by co-appellants on these issues.

POINT IV

THE COURT'S REFUSAL TO CONSIDER APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS MONEY ALLEGEDLY SEIZED FROM HIS AUTOMOBILE ON FEBRUARY 3, 1972 AND THE CONSEQUENT ADMISSION OF TESTIMONY AT TRIAL ABOUT THAT MONEY, DEPRIVED APPELLANT OF HIS RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE

When, one month prior to the start of the trial in this case, and in the course of other pre-trial suppression hearings, the Government first revealed it would introduce into evidence at trial some money seized from appellant's automobile in February, 1972, counsel immediately objected and moved for the suppression of that money. The Court refused to entertain the motion, stating, "I'm just not going to spend the whole autumn adding onto the pre-trial motions that require evidentiary hearings based on the obviously fertile and energetic machination of counsel in this case." (H. 738-739).

We submit that the trial Court had no power or discretion to deny a suppression motion on grounds of the Court's impatience or fatigue over the length of the pre-trial proceedings, especially when the motion was made in good faith one month prior to trial, and involved substantial issues of law and fact. According to the Federal Rules of Criminal Procedure (41(e) and 12, a motion made prior to trial preserves a defendant's Fourth Amendment objections to the receipt of evidence at trial, and this Court has recently viewed a motion for a minimization hearing made the day trial was to commence as "prior to trial" and thus timely. United States v. Rizzo, decided January 17, 1974, Docket Nos. 73-1941 - 43.

Although counsel argued that the issue of probable cause to seize the money had been raised by his prior written motions,* the Court's finding that it had not been raised in those prior written motions did not constitute waiver of that issue; according to the above rules and case cited, the instant motion was timely made well before trial, when counsel was first apprised that the particular evidence in question would be used at trial. It was made orally and would have been reduced to written form had the Court not refused to entertain it in any form. The Federal Rules, according to their own terms, are to be construed consonant

---

* On June 18, 1973, a memorandum and motion was submitted by appellant Dellacava in which he joined in all motions made by co-defendants, and appellant Guarino had already raised the issue of probable cause for that arrest on February 3, 1972. In addition, in appellant's motion papers in August and September, he moved "upon the indictment, and upon all the proceedings previously had herein, ... for an order ... suppressing certain evidence wrongfully seized in the instant case and all other evidence derived directly or indirectly from such seizure" and "for an order ... suppressing evidence in the possession of the Government and all other evidence gained as a result thereof and for a hearing ...".

with the fair administration of justice (F.R.C.P. 2) and, "we should determine in each particular case whether the procedural default committed defeated the purpose of the rule." Lawrence v. Henderson, 478 F. 2d 705, (5th Cir., 1973). There was no default here, but even if a literal default could be found, there was no substantial violation of the rules or their purpose. A hearing and determination on this motion a month prior to trial would have caused no disruption of the trial, nor was there any indication that that was its purpose, and since the motion was substantial, the warrantless search of appellant's automobile without probable cause, fairness dictated that it be heard. Lawrence v. Henderson, supra.

The arrest at Rockefeller Center on February 3, 1972, was a "direct product" of the overhear of conversations on the Diane's Bar tap (prosecutor's statement at H. 695). The arrest was thus based on the "one shot cryptic" references throughout those conversations, which the Court below, at trial, ruled were not the subject of any expertise.

> I have heard about things like the girl and boy in the narcotics trade where you have a rather general usage in the streets and that is quite a different thing from this once or twice I heard chopped liver - which is my way of saying hors doeuvres and I knew right away they meant heroin. I don't find that, with all deference to the Court of Appeals, I don't think that is what the Court was talking about that kind of thing, a one-shot use of a cryptic term which this officer figured meant heroin. (2199)

Thus, these conversations alone, containing no recognized narcotics argot, and unconnected to other evidence which would give them that meaning, at least to the extent necessary to raise more suspicion to probable cause, were the only basis for the February 3 arrest, and, as such, were insufficient to establish probable cause. Indeed, the conversation on the day of arrest simply arranged a meeting, no narcotics were discovered in the search, and the case was soon dismissed. Detective Eaton's interpretations of "chess game", "present", "being sick","growing", etc. were based he said at one point in the hearings, on his inability to make sense out of the

conversations, and because something he heard "might" have a certain meaning (rde 41-50). These were obviously subjective evaluations without foundation in his special expertise or other facts, * and subjective evaluations of otherwise innocent conduct do not probable cause make. Sibron v. New York, 392 U.S. 40 (1968).

> The police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.

Terry v. Ohio, 392 U.S. 1, 21 (1968). Nor can Detective Eaton's suspicions be permitted to color all otherwise innocent conversations and activities of appellant, like his driving to the social club and putting a package in his automobile, or his mere presence in Diane's Bar or association with others suspected of crime. Spinelli v. United States, 393 U.S. 410 (1968); United States v. Di Re, 332 U.S. 581 (1948); United States v. Burhannon, 388 F. 2d 961 (7th Cir., 1968); United States v. Viole, 312 F. 2d 595 (2nd Cir., 1963) cert. den. 373 U.S. 903, Perry v. United States, 336 F. 2d 748 (D.C. Cir., 1964); Mangaser v. United States, 335 F. 2d 971 (9th Cir., 1964). It is on these bases that the motion to suppress should have been heard and decided below, but since a full examination of the facts surrounding the arrest and search on this issue, wasnot had, the evidence should be suppressed and a new-trial ordered, or the case should be remanded for a hearing and new trial. Inge v. United States, 356 F. 2d 345 (D.C. Cir., 1966).

---

* cf. United States v. Borrone - Iglar, 468 F. 2d 419, 421 (2nd Cir., 1972), wherein the officer had been qualified as an expert at trial to testify to the meaning of "narcotics vernacular."

POINT V

THE COURT'S FAILURE TO GIVE LIMITING INSTRUCTIONS THROUGHOUT THE TRIAL UPON RECEIPT OF EVIDENCE OF HEARSAY CONVERSATIONS AND ACTS IN FURTHERANCE OF SEPARATE CONSPIRACIES, AND THE COURT'S GENERAL AND CONTRADICTORY FINAL CHARGE ON THIS SUBJECT, AND THE GOVERNMENT'S PREJUDICIAL EVIDENCE OF UNCHARGED CRIME AND SEPARATE CONSPIRACIES, DEPRIVED APPELLANT OF A FAIR TRIAL

At the beginning of his testimony, the major Government witness, Joaquin Ramos, related conversations between himself and Marco Delgado concerning Ramos' re-entry into the narcotics business in 1969, after a prison term. These conversations took place at the inception of the conspiracy as charged in the indictment. Notwithstanding objection to the hearsay and a request that the jury be instructed on the limits of their consideration of these conversations against any defendant, pending other evidence of the existence of the conspiracy and the defendant's membership therein, the Court overruled the objection and denied the request. "No. I will give an instruction if and when it is necessary." (143, 142-143). Ramos continued to testify to out-of-court conversations between himself and other alleged conspirators; other witnesses related hearsay conversations, and the objection was reiterated and overruled and no limiting instructions were given.* The Court also repeated its intention to instruct the jury only after all the evidence was in. (304, 313-316, 2239, 2243-45, 2308).

This failure of the Court below to give the limiting instructions at the time

---

* Those conversations included Harris, Jermain and Ramos about a gift of automobiles from Harris to Jermain and Ramos and money owing from Harris (266-268); Morris, Jermain and Ramos in Miami in February, 1971 (304, 313-316); Sperling to Capra about a "load" (335, 336, 345); Guarino and Capra about starting Sperling in the business (470-471); and the entire Joseph Conforti testimony about conversations with Caruso and Sperling (2389-2394, 2413-2419, 2651-2653); the Capra - Guarino conversation that Dellacava handled the goods (835, 980-985).

of the receipt of objectional hearsay evidence, has been held, ever since Judge Hand's opinion in Nash v. United States, 54 F. 2d 1006 (2nd Cir., 1932), to be reversible error. The difficulties in making the necessary distinctions among the individual defendants in a multi-defendant conspiracy trial, the complexity of the rules of evidence directing what evidence is applied against which defendant, require that the jury be constantly reminded that the hearsay does not "bootstrap" the pre-requisite foundation evidence forthe consideration of the hearsay itself. United States v. Appollo, 476 F. 2d 156, 163 (5th Cir., 1973). The instruction must be given when it is first requested, and, if not, a final charge at the end of the case comes too late. This rule of law, enshrined by the Supreme Court of the United States in Lutwak v. United States, 344 U.S. 604 (1953)*, imposes a minimum obligation on the trial court (United States v. Appollo, supra), and in this case, "the lack of a particularized and repetitive instruction upon the subject was error vitiating the conviction of all." Green v. United States, 386 F. 2d 953, 957 (10th Cir., 1967).

Closely related to this error, which in itself requires reversal of the conviction, is the failure of the Court to give continuing instructions that acts of others committed in furtherance of separate conspiracies, or acts committed outside the single conspiracy as charged in the indictment, could not be considered against the defendants on trial, and that a particular defendant's participation in the conspiracy as charged was to be determined by his own acts and words. United States v. Russano, 257 F. 2d 712 (2nd Cir., 1958); Kotteakos v. United States, 328 U.S. 750 (1946). The reason behind the rule requiring repeated instruction on the limited consideration of conversations,

* "These declarations must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them." 344 U.S. at 619.

requires the same when acts of others are to be put before the jury in a multi-defendant conspiracy case. The jury must understand, while the trial is proceeding, that they should be making distinctions among the evidence to be considered against the several and individual defendants. When they do not understand that as the evidence is being received, a final charge at the end, after they have been considering everything against everybody in the case, does not sufficiently equip them to do the impossible sifting job all at once. Although the physical acts are not objectionable as hearsay*, their application to any particular defendant is nonetheless limited, and the instruction is required.

> ... the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof. United States v. Costello, 352 F. 2d 848 (2nd Cir., 1965).

Throughout this trial, as with the hearsay declarations, objections were made to the admission of separate acts outside the ambit of the single conspiracy as charged, and to acts unconnected to particular defendants. These objections were overruled throughout the trial and the judge refused limiting instructions** He had stated his

---

* The hearsay, on the other hand, is admissable when it is found to be an act in furtherance of the conspiracy. "The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution." United States v. Renda, 56 F. 2d 601, 602 (2nd Cir., 1932).

** These objections came at the close of the Government's opening statement (25-27); the Jermain, Ramos, Morris meeting in Miami in February 1971 (304, 313-316); the Capra-Sperling visit and "load" conversation (335-336, 345); the Capra-Guarino conversation about Sperling (470-471); the December, 1970 arrest of Simms and the receipt of the heroin seized from him (1568-72); the Toledo heroin (1743, 1798); the pieces of paper seized from Morris in Toledo (1803-1815); Conforti's testimony about the Sperling conspiracy (2389-2394, 2413-2419, 2651-2653); the tracings from the Bar Harbor hotel (2888-2894).

intention to see how it all looked at the end of the case (304, 313-316, 2239, 2243-45, 2308), and to give instructions "if and when it is necessary." (143).

The Court disregarded the necessity for instructions prior to the final charge, and if a final charge, correct on the law, would have been insufficient to cure the error (United States v. Appollo, supra), the Court's final charge, incorrect on the law, could not do so. The Court finally charged,

> I have told you in a fairly standard legal conception that in a sense, one conspirator, one member of a conspiracy, is said to be the agent of every other member. One of the things that follows from this is that if a jury finds from a preponderance of the independent evidence as to each individual alleged member, that people I shall call for the moment A, B and C are all members of a conspiracy, then the acts or declarations of A, even in the absence of B and C, may be taken as evidence against B and C, provided that those acts or declarations occur during the conspiracy and in furtherance of it. (3942)(emphasis added).

Objection was taken to this misdirection to the jury to apply the preponderance standard, the standard the judge applies to determine threshold admissability. The preponderance test of admissability was not designed to alter the jury's application of the standard of beyond a reasonable doubt in determining ultimate questions of guilt or innocence. United States v. Geaney, 417 F. 2d 1116 (2nd Cir., 1964); United States v. Cantone, 426 F. 2d 962 (2nd Cir., 1970) cert. den. 400 U.S. 827. This objection was overruled, and the erroneous charge stood through the jury's deliberations, until near the end of the deliberations when they asked whether a defendant could be found guilty of the conspiracy even if he had not committed an overt act. At that time, the Court charged they would first have to find the defendant to be a member of the conspiracy beyond a reasonable doubt (4081). The jury was never told to disregard the previous, incorrect standard given to them in the judge's main charge, and their verdict, which obviously turned, in their minds, on this issue, should not be permitted to rest on ambiguous,

equivocal, or contradictory instructions. Bollenbach v. United States, 326 U.S. 607, (1946); United States v. Christman, 298 F. 2d 651 (2nd Cir., 1962); Gagliardo v. United States, 366 F. 2d 720 (9th Cir., 1966).

We submit further that "the jury could not possibly have found, upon the evidence, that there was only one conspiracy." Kotteakos v. United States, supra, at 768; United States v. Russano, supra. The Government's evidence showed at least one separate conspiracy involving Joseph Conforti, Herbert Sperling and John Caruso. Conforti's testimony concerning his narcotics mixing activities for Sperling in a Long Island hotel in March and April, 1973, included no evidence to link appellant with any of these men or their activities. This was a separate criminal enterprise, the evidence of which made no mention of appellant and described events in March, 1973, one year after the last alleged conspiratorial acts of appellant in February, 1972.* The prejudicial variance arising out of these events erroneously admitted against appellant is stronger than it was in Russano, supra, because here, not only is there a time hiatus, but the actors are different.

> If appellants had been tried only for the 1952 conspiracy, the admission of evidence relating to the later conspiracy of 1955-1956 would have constituted prejudicial error. Similarly, if they had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial. United States v. Russano, supra at 715.

In this case, as in Kotteakos and Russano, appellant was deprived of a fair trial, because the danger of "transference of guilt" between the separate conspiracies,

---

* The Court seemed to believe this evidence was admissable against appellant because he was arrested in April, 1973, and tracings were found in the gym bag (3492-3541), but this act was isolated from any connection to the Conforti-Sperling conspiracy; there was no evidence of connection or association, nor was there evidence that it was linked to the events prior to February, 1972.

as proved, was so great.

And, appellant was further prejudiced by the introduction against him of an uncharged isolated act of possession of heroin tracings, an act of possession in April, 1973, when the only other evidence linking him to any conspiracy ended in February, 1972. Although prior or subsequent uncharged criminal acts may be admissable to prove motive, intent, or design if those acts are closely connected in time with the conspiracy, in this case appellant did not take the stand and those issues were not present in the case; dust had no probative value to the charges on trial (Diaz-Rosendo v. United States, 364 F. 2d 941 (9th Cir., 1966), and the subsequent act occurred one year after the last supposed conspiratorial acts shown by the other evidence; United States v. Russano, supra; United States v. Marchiso, 344 F. 2d 653, 664 (2nd Cir., 1965).

Should this Court find as it did in United States v. Borelli, 336 F. 2d 376 (2nd Cir., 1964), that the jury could have found a single conspiracy, a reversal is still mandated, as it was in Borelli, because the charge to the jury did not focus attention on the scope of appellant's particular involvement in it. Since the evidence was, at the least, ambiguous as to appellant's involvement in the Conforti-Sperling business, the failure of the Court to specifically charge his exclusion, as requested, or to specifically apprise the jury of their task to determine his involvement or non-involvement in the entire overall scheme as charged in the indictment, required reversal of the conviction. The danger of "over-extension of a legal doctrine" of conspiracy, noticed in Borelli, supra, and United States v. Kelly, 349 F. 2d 720 (2nd Cir., 1965), was not avoided in this case, because the Court's general charge that,

> if the Government has not established such a conspiracy but has established only a variety of different and unconnected conspiracies among different people, there would be a failure of proof as to element one under count one and you would have to acquit on that count (3934),

did not specify the evidence against each defendant and whether his membership in the entire overall scheme had been proved. The jury was not made to understand that any defendant whose membership in the overall scheme was not proved, notwithstanding proof against him of membership in some separate agreement, and notwithstanding proof against any other defendant of membership in the overall scheme, must be acquitted. They were permitted, under the charge as given, to render an all or nothing verdict as to all the defendants; since they did that, the conviction must be reversed.

POINT VI

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE GOVERNMENT EXAMINATION OF WITNESSES WHICH ELICITED IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY ABOUT NON-PROBATIVE AND PREVIOUSLY EXCLUDED MATTER AND BY THE USE OF EVIDENCE OF MINUTE DUST TRACINGS CONSUMED IN GOVERNMENT ANALYSIS

During his examination of Detective Eaton about the seizure of money from appellant's automobile in February, 1972, the prosecutor asked, and received an affirmative answer, "Has this currency been handed over to the Internal Revenue Service?" (2228). Then the detective admitted he had no personal knowledge about what was done with the money; the Court sustained objection, realized the testimony was hearsay, but refused to strike it or instruct the jury (2229-2230).

During his examination of Herbert Sperling, called as a defense witness, the prosecutor asked, "Were you indicted (in 1959) for violation of the Federal

narcotic laws ... Did Count 17 charge that the defendants, Joseph Valachi, Ralph Wagner, Herbert Sperling and _____." (3330-3331). Objection was sustained and the Court instructed, "disregard the list of names." (3332).

The Government had called Milton Julert, who was one of the witnesses who identified Ramos as the man who delivered the suitcase to the Toledo Railroad Station, and as with all these witnesses, the Government attempted to suggest that he had picked the wrong man. This was important to the credibility of Ramos, the Government's major witness, who denied making the delivery to Toledo and claimed he was wrongly convicted in Ohio. When they failed to shake Julert, the Government excused him but later recalled him to have him testify that at one time he picked out a photograph of another man. The Court precluded this line of questioning on recall, because "there is the aura of pressure here on him, and there is the lack of any excuse for not having made this kind of test...to show that he can misidentify earlier." Immediately after this ruling from the Court, the prosecutor asked, in open court,

> Mr. Julert, have you had a recent experience in which you have misidentified _____ (2957)

Objection was sustained; there were no instructions to the jury, because, the Court said, "The jury knows that a question is not evidence." (2958).

The Government elicited the following testimony from Joaquin Ramos, over objection:

> Q. Did you ever have any conversations with Steven Dellacava as to what was contained in those brown bags?
>
> A. Yes.
>
> Q. What was in that?
>
> A. Junk. (988).

Objection was overruled.

Each of the above occasions injected irrelevant and inflammatory misinformation into the trial, and the jury's hearing of it intolerably tainted this trial. In the first instance above, the prosecutor was clearly suggesting other crimes in his leading question about the turning of the money over to the Internal Revenue Service, and it was only a leading suggestion because Eaton had no direct knowledge. Thurman v. United States, 316 F. 2d 205 (9th Cir., 1963); Ross v. United States, 180 F. 2d 160 (6th Cir., 1950); United States v. James, 208 F. 2d 124 (2nd Cir., 1953). The Court's refusal to strike, compounded the prejudice. In the second instance, the prosecutor once again suggested an inflammatory association within the confines of his question, was Sperling indicted with Joseph Valachi. This question, and the chemists blurting out of "The French Connection" on his redirect examination (243), were both fatal to a fair trial. The jury was told what league in which to put this case. United States v. Bugros, 304 F. 2d 177 (2nd Cir., 1962).

After the Government was specifically directed by the Court not to examine Julert on recall about prior misidentification, the prosecutor once again gave his own testimony by asking the question containing the answer, "have you had a recent experience in which you have misidentified." Objection was sustained, but the jury, without instruction to strike, got the message. As in the above instances, such bad faith acts on the part of the Government have been cause for reversal even when they are single instances in a trial. Garris v. United States, 390 F. 2d 862 (D.C. Cir., 1968); United States v. Simmons, 414 F. 2d 800 (9th Cir., 1969).

A conversation with appellant about what was in the packages was elicited, and, without any testimony about the circumstances of the conversation, time, place, actual content, Ramos was permitted to testify, not to the conversation, but that "junk" was in those packages. This left an impression that appellant had made a direct

admission that he knew heroin was in the packages, the only such admission in the case. This was not Ramos' testimony, however, nor could it have been, since he obviously did not remember a specific conversation.

> ... when a witness testifies in terms of conclusions such as 'he agreed' or 'they all agreed' or 'he made admissions', such answers should be stricken and the witness should be required to state what was actually said. The conclusion or interpretation of a witness as to the meaning of what someone said is not admissable. DeLoach v. United States, 307 F. 2d 653, 655 (D.C. Cir., 1962) (Burger, J.)

See also United States v. Kahn, 472 F. 2d 272, 279-280, (2nd Cir., 1973); Barnes v. Tenin, 429 F. 2d 117 (2nd Cir., 1970); United States v. Lewis, 406 F. 2d 486, 493 (7th Cir., 1969), cert. den. 394 U.S. 1013. Each of the above obviously prejudicial questions and references requires reversal and certainly together they deprived appellant of a fair trial on the issue of guilt of the crimes charged.

Finally, appellant preserves objection to the introduction of testimony about the dust tracings which the Government consumed in its analysis. Appellant was deprived of his right to present a defense and to cross-examine; (cf. United States v. Grayson, 166 F. 2d 863 (2nd Cir., 1948) (Hand, J.)); the quantity was too small to permit an inference of possession with intention to distribute (Turner v. United States, 396 U.S. 398, 423 (1970); United States v. Vallejo, 312 F. Supp. 244 (D.C.N.Y.(aff'd. 438 F. 2d 663; Diaz-Rosendo v. United States, 364 F. 2d 941, 944 (9th Cir., 1966)), and the inference from the chemist's testimony that particles of dust from other heroin samples in the laboratory and in the DEA office safe could have settled on the bag and his further testimony that he consumed the entire amount of dust, because he wished to ensure the finding of some traces, renders the tracings unconnected to appellant and indicates direct Government preclusion of defense access for the purpose of Government proof. United States v. One 1966 Chevrolet Sedan, 14 Cr. L. 2387, 2389 (D.C. S. Fla., decided January 16, 1974); People v. Pippin, 16 A.D. 2nd 635 (1st Dept., 1962).

POINT VII

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28(i) APPELLANT DELLACAVA RESPECTFULLY INCORPORATES BY REFERENCE ANY ARGUMENTS RAISED BY CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED

Respectfully submitted,

LAWRENCE STERN
Attorney for Appellant Dellacava
343 West 29th Street
New York, N.Y. 10001
(212) 947-0537

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of March ; 1974 at No. FOLEY SQUARE deponent served the within BRIEF upon U.S. ATTORNEY the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for appellee therein.

Sworn to before me,
this 20 day of March 1974

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973